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# REPORTS OF CASES

ARGUED AND DETERMINED

IN

## The Court of Exchequer,

WITH

A TABLE OF THE NAMES OF CASES

AND

*A DIGEST OF THE PRINCIPAL MATTERS.*



BY

FRANCIS STACK MURPHY AND EDWIN TYRRELL HURLSTONE, Esqrs.

OF THE INNER TEMPLE, BARRISTERS AT LAW.



FROM HILARY TERM, 7 W. IV. 1836,  
TO MICHAELMAS TERM, 1 VICT. 1837,

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**J U D G E S**  
**OF THE**  
**C O U R T O F E X C H E Q U E R,**

*During the Period comprised in this Volume.*

---

**The Right Hon. JAMES, Baron ABINGER,**  
**Lord Chief Baron.**

**BARONS.**

**Sir JAMES PARKE, Knt.**  
**Sir WILLIAM BOLLAND, Knt.**  
**Sir EDWARD HALL ALDERSON, Knt.**  
**Sir JOHN GURNEY, Knt.**

---

**ATTORNEY GENERAL.**

**Sir JOHN CAMPBELL, Knt.**

**SOLICITOR GENERAL.**

**Sir ROBERT MOUNSEY ROLFE, Knt.**

## MEMORANDA.

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IN Hilary Vacation, Mr. Justice *Gaselee* resigned his seat on the bench, and *Thomas Coltman*, Esq., K. C., was appointed a Judge of the Court of Common Pleas in his room, and was knighted. He was first called to the degree of the coif, and gave rings with the motto—“*Jus suum cuique.*”

*Francis James Newman Rogers* of Lincoln's Inn, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton*, jun., of the Inner Temple, Esq.; *John Evans*, of the Inner Temple, Esq.; *Richard Budden Crowder*, of the Middle Temple, Esq.; *Francis Whitmarsh*, of Gray's Inn, Esq.; and *Charles Purton Cooper*, of Lincoln's Inn, Esq.; were appointed his Majesty's Counsel; and *John Jervis*, of the Middle Temple, Esq., received a patent of precedence.

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# CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Hilary Term, 1837.

DUNCAN v. CAFE.

**M**ONEY had and received, brought by the plaintiff against the defendant, to recover the sum of 87*l.* 10*s.* At the trial before Lord Abinger, C. B., at the last sittings after Michaelmas Term, a verdict passed for the plaintiff for the whole amount.

Sir *W. W. Follett* now moved, pursuant to leave reserved, to enter a non-suit. The facts of the case were as follows. The plaintiff was the attorney of a person of the name of *Griffith*, between whom and a *Mr. Hayward* disputes had arisen touching certain property. It was finally agreed to leave these disputes to the arbitration of the Master of this Court, who directed the sale of certain leasehold property to which *Hayward* was described to be entitled as administrator of one *Adams* deceased; no administration however had in point of fact been taken out, although *Hayward* had undertaken so to do; of this fact *Duncan* was aware. The sale was directed to be made by the defendant *Cafe*, in his capacity of auctioneer, and the proceeds arising therefrom were, by the award, directed to remain in the hands of *Cafe*, to be paid over, (after deducting the amount of the taxed costs) one-third to *Hayward*, and two-thirds to *Griffith*; the costs of the award to be paid by both parties.

By the direction of the plaintiff and of *Hayward*, *Cafe* sold the property, the plaintiff well knowing at the time of the sale that *Hayward* had not as yet taken out letters of administration to *Adams*. At the first sale *Hayward* was declared the purchaser; but in consequence of certain informalities, it was

*Exchequer.*

Where disputes between A. & B. touching certain leasehold property had been referred to the Master, he awarded, that the property in question should be sold by the defendant, an auctioneer, and the proceeds paid over in certain proportions to A. & B. The former owner of the property had died intestate, and B. had undertaken to take out administration to him, and so make title to a purchaser. Before administration had been taken out, A. & B. jointly authorized the defendant to sell the property, and A. was declared the purchaser, and paid into the hands of the defendant 8*l.* 7*s.* 10*d.* as a deposit; he moreover entered on the premises, and obtained attornment from the tenant in possession. Subsequently B. being

unable to procure the letters of administration. A. rescinded the contract, and brought money had and received against the defendant to recover the deposit:—*Held*, that the action well lay; and that no notice was necessary from the plaintiff to the defendant of the rescinding of the contract, as it was a fact equally within the knowledge of both plaintiff and defendant.

B

*Exchequer.*  
 DUNCAN  
 v.  
 CAFE.

again put up, and *Duncan* was the highest bidder. Therefore *Duncan* paid the sum of 87*l.* 10*s.* as a deposit on the purchase money. He afterwards, in consequence of *Hayward* being unable to obtain administration (some other person having succeeded in so doing), refused to complete the purchase, as no sufficient title had been made out, and he brought this action against the defendant to recover back the deposit. No notice of the rescinding of the contract of sale had been given by the plaintiff to the defendant, with the exception of a demand of interest on the money so deposited. It also appeared that the plaintiff had entered into possession of the premises in question, and had obtained 1*s.* in the name of rent from the tenant in possession, in the nature of an attornment.

Sir *W. W. Follett* now contended, that even under ordinary circumstances, where a stakeholder holds the money of third parties, the person seeking to recover his share of the money ought to give notice that the contract, in pursuance of which the money was deposited, is at an end. Under the peculiar circumstances of the present case, such notice is still more necessary, and without such notice the plaintiff is not entitled to recover. This is not the case of money spontaneously deposited by the parties, but was done in consequence of the Master's award, which award moreover directed the application of the money by the defendant. The defect in the title was no surprise on the plaintiff: at the time of the purchase, he well knew that administration had not been taken out to *Adams* by *Hayward*; he moreover has precluded himself from disputing the title, by entering on the premises, and obtaining attornment from the tenant. It is the invariable rule of Courts of Equity not to rescind contracts of sale, if the vendee has entered into possession. Regarding the present case, however, as one of strict law, the case of *Hunt v. Silk* (a), is in point to show, that after possession taken under a purchase, the contract cannot be rescinded so as to entitle the vendee to bring money had and received. [PARKE, B.—Is he bound to accept a deficient title, because he has taken possession? Or is the defendant's contract altered by the plaintiff's so taking possession?] The real question is, whether in strict law an auctioneer is entitled to notice of the rescinding of the contract. [PARKE, B.—Ought not an auctioneer to take notice of the events on which he is to pay over the money to either party? It does not lie more in the knowledge of the one than of the other.] Mr. *Cafe* is selected by *Duncan* and *Hayward* to make the sale; he is moreover selected by reason of the Master's award; herein he differs from an ordinary stakeholder. [PARKE, B.—This is the simple case of a purchaser who has paid a deposit without a good title being made out: we need not embarrass ourselves with the award; the award does not come into operation until title made and sale completed; under the circumstances of the present case it did not come into play.] Still *Duncan* knowing that no administration had been taken out by *Hayward*, authorizes *Cafe* to sell, and to receive the money before title was made out; and herein the present differs from the ordinary case of a deposit on a sale where the title proves defective, for it is a purchase with knowledge of the defect.

(a) 5 East, 449.

LORD ABINGER, C. B.—I do not think the entering into possession by the plaintiff makes any difference in the present case. It appears to me that the defendant was in the situation of an ordinary stakeholder, and, as such, did not require any notice of the rescinding of the contract, in order to entitle the plaintiff to recover. If indeed the money had not lain in his hands, by reason of having been paid over by him immediately to the vendor, notice might have been requisite. [Sir *W. W. Follett* suggested that the contrary was held in *Gray v. Gutteridge* (b).]

*Erchequer.*  
*DUNCAN*  
v.  
*CAVE.*

PARKE, B.—This is the common case of a deposit made on a sale by auction; the auctioneer is nothing but a mere stakeholder. The vendor having failed to make a good title, the vendee is entitled to recover back the deposit. The law in such case does not require any notice to the auctioneer, as he is equally in a condition with the party claiming the money, to take notice whether the sale has or has not been completed.

Rule refused.

(b) 1 Man. & Ry. 614. 3 C. & P. 40, S. C. The reason there given is, that it is the duty of an auctioneer, when he receives a deposit, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs.

### DOE, d. BANKES, v. ROE.

**R**ULE for judgment against the casual ejector. The Master had refused to draw up the rule for an alleged informality in the title of the affidavit of service. The declarations contained four demises: two by *Meyrick Bankes*, Esquire, and two by *A. B.*, chapelwarden of the chapelry of *Billinge*, in the county of *Lancaster*, and *C. D.* and *E. F.*, overseers of the same chapelry (stating their real names). The affidavit was entitled, "*John Doe*, on the several demises of *Meyrick Bankes*, *A. B.*, *C. D.*, and *E. F.*" also stating the real names. The Master considered, that the title should have been, "*John Doe*, on the two demises of *M. Bankes*, Esquire, and on the two demises of *A. B.*, chapelwarden, &c. and *C. D.* and *E. F.*, overseers, &c.

The title of the affidavit of service in a motion for judgment against the casual ejector is sufficient, if it contains the names of all the lessors, without stating the demises with the same particularity as in the declaration.

*Cowling* now contended that the title of the affidavit was sufficient, and cited *Doe, d. Jenks, v. Roe* (a).

*Per Curiam*.—The same particularity is not necessary in the title of the affidavit as in the declaration; it is sufficient to state the names of the lessors, and not the frame of the demises; there is enough of certainty in this title to support an indictment for perjury.

Rule absolute.

(a) 3 Tyr. 602. 2 D. P. C. 55.



*Eschequer.*

## LEWIS v. KER.

The Uniformity of Process Act has not taken away the privileges of an attorney to be sued in his own Court.

**THIS** was an action of assumpsit by the plaintiff, an indorsee, against the defendant, as an acceptor of a bill of exchange.

The declaration was in the usual form.

*Plea.*—And the defendant, in his own proper person, says, that before and at the time of making the promise in the declaration, he, the defendant, was, and hath thence hitherto been, and still is, one of the attornies of the Court of our Lord the King before the King himself, and, during all the time aforesaid, hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the said last-mentioned Court for divers subjects of our Lord the King, as their attorney; and the defendant further saith, that he and all the other attornies of the said last-mentioned Court ought, by the ancient and laudable custom of such Court from time immemorial, used and approved of according to the laws and customs of this realm and the liberties and privileges of the last-mentioned Court, to be free and exempt from being compelled against their will, and have not at any time been used or accustomed to be compelled to answer any plea or plaint in any action personal (pleas of freehold, felony, and appeal, only excepted) before any justice or minister of our Lord the King, or any judge whatever, except before the justices of our said Lord the King, before the King himself; and the defendant further says, that he is not, nor ever was, an attorney, officer, or minister of the said Court here; and this the defendant is ready to verify: wherefore he prays judgment if the said Court of our Lord the King will or ought to take cognizance of the said plea.

*Demurrer and joinder.*

*Platt*, in support of the demurrer. The present plea is rather different from the old form, but is still in substance a plea of privilege of an attorney of the King's Bench to be sued in that Court. The old form used to state, "an ancient and laudable custom to be sued by 'bill exhibited' in the said Court." The present plea does not adopt that form; and therefore the form, according to which alone the privilege was claimable (as the proceeding by bill no longer exists), having been abolished, by the Uniformity of Process Act, 2 Will. 4, c. 39, the words of this statute are strong to put attornies on the same footing as the rest of the King's subjects. The proceeding by bill being done away with, the laudable custom involving as an ingredient this peculiar mode of proceeding, must also be done away with, it being a principle of law, that a custom to be good, must be invariable. Besides, the principle upon which the privilege originally rested was the paucity of attornies; a reason which has long ceased to be of force.

*Barstow*, who was to have argued on the other side, was stopped by the Court, and *per Curiam*.

The only effect of the statute is to substitute a new process for the old form by bill. It was not the intention of the legislature collaterally to repeal this privilege. If the plea is good in form, it is good in point of law.

Judgment for defendant (*a*).

(*a*) Vide *Dyer v. Levy*, 4 D. P. C. 630.

*Exchequer.*

## LEWIS, Executor of WILLIAMS, v. MARFELT.

AT the trial before Lord Denman, C. J., at the Summer Assizes for Cardiff, the jury found a verdict for the defendant. *Evans*, in the course of last term, obtained a rule on affidavits to exempt the plaintiffs from payment of costs, on the ground that they had reasonable cause for bringing the action. The facts of the case were these:—The plaintiff, in looking over the papers of the testator, found a memorandum of the defendant, acknowledging a loan by the testator to him of 300*l.* to be paid in two months. The plaintiff in consequence applied to the defendant, who informed him that he had paid back the money; but that he had no receipts to produce, as it was the habit of himself and testator, in settling their accounts, to burn all papers relating to their dealings. A person of the name of *Probyn* was by when money was given, and after, when payments were made by defendant to plaintiff's testator; and on being applied to by plaintiff, stated both these facts. The plaintiff, however, told him to say nothing about the payment. This being told by *Probyn* to the defendant, he directed *Geach*, his attorney, to give no information to the plaintiff, but to defend the action. This was accordingly done; and *Geach*, at the trial, proved the payment of the money by the defendant to plaintiff's testator. *Chilton* now shewed cause on affidavits, and cited *Engler v. Twisden* (a), *Southgate v. Crawley* (b), *Godson v. Freeman* (c).

Executors are *primâ facie* liable to the payment of costs if they fall in an action; and it is not enough, to exempt them, to show that they brought the action *bonâ fide*.

*Evans, contra*, cited *Lysons v. Barrow* (d).

PARKE, B.—That case is overruled.

*Sed per Curiam*.—Executors are *primâ facie* liable to costs; it lies on them to prove strong grounds for exemption from paying them. It is not enough that they have brought the action *bonâ fide*. They must moreover use very strict caution in ascertaining whether they have good grounds of action. It is plain in this case, that there was every reason for the plaintiff to suppose that there had been a full settlement between the defendant and his testator.

Rule discharged.

(a) 2 Bing. N. C. 263. 1 Hodges, 303.  
8 C.

(b) 1 Bing. N. C. 518. 1 Hodges, 1 S. C.

(c) 2 C. M. & R. 585.

(d) 10 Bing. 563.

*Exchequer.*

## HARDING v. STOKES.

The 5 & 6 W. 4, c. 76, sect. 54, creates three offences. The first is, the offence of "procuring to vote;" the second is, "corrupting," which is complete, by the offer and acceptance of a bribe; the third is, "offering to corrupt."

In an action on this statute the declaration stated, that the defendant did corrupt one J. W. to vote; and the evidence went to show, that the offer had been made by the defendant to J. W., who in reply said, "It is a good job, but I have already promised the other side;" and nothing more passed between them: the Judge at the trial nonsuited the plaintiff:—*Held*, that the nonsuit was wrong, and that it ought to have been left to the Jury to say, whether there had been an acceptance by J. W., so as to complete the offence stated in the declaration.

**DEBT** for a penalty of 50*l.* alleged to have been incurred under 5 & 6 Will. 4, c. 76, s. 54.

The declaration stated, that the Borough of *Bristol* is a borough in which, by a certain Act of Parliament, made and passed in the sixth year of the reign of his present Majesty, intituled, "An Act to provide for the Regulation of Municipal Corporations in *England and Wales*," it was provided and directed that an election should be had and made of a certain number of fit persons, who should be, and be called, the Councillors of the said borough; that heretofore, to wit, on the 26th day of *December*, 1835, the election of such councillors took place in pursuance of the said Act; and before and at the said election *R. P.*, *J. B.*, and *H. G.*, were candidates to be elected as councillors of the said borough. And the plaintiff in fact saith, that the defendant, not regarding the statute in such case made and provided, before the said election for the said borough, to wit, on the 24th day of *December*, in the year last aforesaid, *did corrupt* one *J. W.*, who then and from thenceforth, until and at the time of the said election, had a right to vote in the said election, to give his vote in that election for the said *R. P.*, *J. B.*, and *H. G.*, so being such candidates as aforesaid, by then corruptly promising to give the said *J. W.*, if he should vote in the said election for the said *R. P.*, *J. B.*, and *H. G.*, employment in hauling stones, at and for certain hire and reward to be paid for the same; which said employment was so then promised by the said defendant to the said *J. W.*, as and for a reward to the said *J. W.*, to give his vote for the said *R. P.*, *J. B.*, and *H. G.*, contrary to the form of the statute in such case made and provided; whereby, and by force of the said statute, the defendant forfeited for his said offence the sum of 50*l.*; and an action hath accrued, &c.

*Plea*.—Not guilty.

At the trial before *Alderson*, B., at the last summer assizes for *Bristol*, it appeared that the defendant, during the election of the municipal officers, applied to one *James Wakefield* (who was called as a witness), and stated that he understood *Wakefield* was going to vote for certain individuals, adding, "If you vote for so and so (naming them), I will give you employment in hauling stones." *Wakefield* answered, "It is a good job—but I have already promised the other side." *Wakefield* and the defendant then separated, and the witness voted for the party to whom his promise was originally given. It was objected at the trial that there was a variance between the declaration which stated that the defendant "did corrupt" the witness, and the evidence which showed that he had only "offered to corrupt." The objection was at first overruled, and the case went to the jury: they were locked up all night, and being unable to agree, in the morning his Lordship nonsuited the plaintiff.

*Erle* obtained a rule last Term to set aside the nonsuit; against which rule

*Butt* showed cause.—This point arises on the Municipal Corporation Reform Act, 5 & 6 Will. 4, c. 76, s. 54 (a). It will be perceived that this act creates altogether a new offence, and in that respect differs from the statute against bribery at elections of members of parliament, 2 Geo. 2, c. 24. The declaration in the present instance is framed on the latter act, the words being “the defendant did corrupt,” &c. On looking at the evidence, it is plain that the offence of the defendant was “an offer to corrupt,” and not a mere “corrupting,” within the meaning of the present act; and the difference made at the trial between the two acts is highly important. If the offence specified by the act was merely the “corrupting,” then the “offer to corrupt” might be evidence of “corrupting;”—here, however, the legislature made a new and distinct offence; viz. “offering to corrupt.” The evidence must, therefore, apply to the offence stated in the declaration. In reading the section, it is clear the act contemplates three offences:—First, the corrupting a party to vote—second, procuring—third, offering to corrupt or procure. It is necessary to do more than merely “offer to corrupt,” in order to complete the offence of “corrupting” within the meaning of the present act. The case of *Henslow v. Fawcett* (b), shows, that under the Bribery Act the offer and payment of money, even though the party corrupted does not vote, completes the offence contemplated by that act. Here the case is different. The contract must be a binding one, in order to complete the offence of corrupting; in the absence of a binding promise it would be a mere offer. To constitute a promise, or agreement, there must be an assent of both parties, and the same construction must be put on both the words “promise” and “agree,” viz. an assent on both sides. The word “gift” speaks for itself. Now in the present case there is no such agreement from which the Court could infer that there was evidence to prove the charges of corrupting—it was merely an offer unassented to: the defendant says, “If you vote for certain persons, I will give you employment.” In this respect the old case of *Tulston v. Norton* (c), to the effect that it is not necessary for a voter to give his vote for the party in whose behalf he is bribed, in order to complete the corruption, is distinguishable from the present. There the money was given, and the act was complete, except the voting. [ALDERSON, B.—No doubt if a man receives a bribe and does not vote, still the act is complete.] In this case no bribe was taken. Every thing lay in offer merely. The proposition was merely made, and not assented to; it was a mere unaccepted offer. The voter had in fact promised to vote for the other party, and did not know what to do—he had a difficulty to accept the offer—he then went away—there was no proof after that any thing was done in consequence. Try the question thus:—has there been a complete offer at one side and an acceptance at the other? It is plain there was not any evidence of an acceptance by the voter. If he had voted, it

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(a) Which enacts, “that if any person, who shall have or claim to have any right to vote in the election of mayor, or of a councillor, auditor, or assessor of any borough, shall, after the passing of that act, ask or take any money or other reward by way of loan, gift, or other devise, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give, or forbear to give, his vote in any such election; or if any person by himself, or any person em-

ployed by him, shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure, or offer to corrupt, any person to give or forbear to give his vote in any such election, such person so offending in any of the cases aforesaid shall, for every such offence, forfeit the sum of 50*l.*, to be recovered by action of debt,” &c.

(b) 3 A. & E. 51.

(c) 1 Wm. Black, 317.

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might have been evidence that he had accepted the offer. It would be necessary for the other side to prove this, viz. an express agreement to accept the offer; otherwise the offence stops short of that stated in the declaration, and amounts to another offence, viz. an offer "to corrupt," which it is clear the Legislature intended to make a distinct offence. [*Per ALDERSON.*—My difficulty is, whether it ought not to have been left to the jury, whether there was not evidence of an acceptance and assent?] [*PARKE.*—It was a question for the jury.] I submit that, taking the fact that he said, "I must take time to consider," the question is, did he consent?

*PARKE.*—I think it impossible to say that there was not evidence to go to the jury that the offer was accepted; and if so, it amounted to the offence of corrupting. On the next trial this question will be submitted to the consideration of the jury. The Act of Parliament contains three different degrees. The first, "procuring to vote;" that is, the giving of a bribe, and the fact of the vote in favour of the party for whom the bribe is given. The second is, "corrupting;" that is, where a bribe is offered and accepted, even though the party bribed does not vote. This was the case of *Henslow v. Fawcett*. I quite concur with the opinion expressed in that case by *Patteson* and *Coleridge*, justices. The third offence, which is not an offence under the act regulating the election of members of parliament, is, "an offer to corrupt." If the jury shall be of opinion that the voter had not made up his mind, then the offence of "corrupting" will not be complete, as the act of the defendant would only amount to an "offer to corrupt."

*BOLLAND, B.*—I am of the same opinion.

*ALDERSON, B.*—Corruption is complete by acceptance, whether the party accepting votes or not. Then it is a question for the jury, whether in this case there was such an acceptance.

*GURNEY, B.*, concurred.

Rule absolute.

*Erle* then applied to add a second count, varying the statement of the offence; viz. in the one, alleging it to be a "corrupting;" in the other, as an "offer to corrupt." But, *per ALDERSON.*—In a statute of a nature so highly penal as the present, disfranchising the party found guilty from voting in all elections, the Court will not extend this indulgence.

### GRIFFITH *v.* HARRIES and another.

The 1 & 2 W. 4, c. 32, directed that penalties for offences against that act should

**TRESPASS** for assault and false imprisonment. Pleas not guilty; and a tender of amends. At the trial before Lord *Denman*, C. J., at the

be paid to the overseer of the parish for the use of the county rate: the 5 & 6 W. 4, c. 30, altered this application, and directed that one moiety of the penalty should be paid to the informer, and the other moiety to the overseer:—*Held*, that a conviction directing the whole penalty to be paid to the overseer, to be by him applied according to the direction of the statute in such case made and provided, was bad; and that the defendants were liable to an action for an imprisonment under it.

at assizes for the county of *Pembroke*, it appeared that the defendants were magistrates, and that the plaintiff was convicted by them under the 1 & 2 Will. 4, c. 32, s. 23, for using dogs for taking game without having a certificate. On the part of the defendants, the conviction was given in evidence, which was as follows:—

“ Be it remembered, that on, &c. *P. Griffith*, &c. is convicted before us, *Mr Hill Harries*, Esquire, and *William Jones*, Esquire, two of his Majesty's justices of the peace, acting in and for the county of *Pembroke* aforesaid, for that he the said *P. Griffith* did on, &c. at, &c. use dogs for the taking of game without having such certificate as is required by law for that purpose, contrary to the statute in that case made and provided. And we, the said justices, adjudged the said *P. Griffith* for his said offence to forfeit and pay the sum of *three pounds*, and also the sum of *ten shillings* and *sixpence* for costs; and in default of immediate payment of the said several sums he the said *P. Griffith* shall be imprisoned in the House of Correction, and kept to hard labour at *Haverford-West*, for the space of one calendar month, unless the said several sums shall be sooner paid. And we direct that the said sum of *three pounds* shall be paid to *William James*, one of the overseers of the poor of the parish of *Mathry* aforesaid, in which parish the said offence was committed, to be by him applied according to the direction of the statute in that case made and provided. And we order that the said sum of *ten shillings* and *sixpence* for costs shall be paid to *George Jordan Harries*, the complainant. Given under our hands and seals, &c.”

It was objected on the part of the plaintiff, that the conviction was not valid, inasmuch as the part which related to the application of the penalty was according to the 37th section of 1 & 2 Will. 4, c. 32; but that section had been repealed by the 5 & 6 Will. 4, c. 20, s. 21, which gives one moiety of the penalty to the informer, and the other to the overseer or parish officer. The learned judge left the case to the jury, who found a verdict for the plaintiff.

*Chilton* having last term obtained a rule to set aside the verdict, and enter nonsuit pursuant to leave;

*Creswell, Wilson*, and *James*, shewed cause. The conviction, with the exception of the word “adjudged,” appears to have been drawn according to the form given by the 39th section of the 1 & 2 Will. 4, c. 32 (a). By the 5 & 6

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(a) 1 & 2 Will. 4, c. 32, s. 37. And be it enacted, That every penalty and forfeiture for any offence against this act (the application of which has not been already provided for) shall be paid to some one of the overseers of the poor, or to some other officer as the convicting justice or justices may direct) of the parish, township or place, in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding or division, in which such parish, township or place, shall be situate, whether the same shall or shall not contribute to such general rate; and no inhabitant of such county, riding or division, shall be deemed an incompetent witness in any proceeding under this act by reason of the

application of such penalty or forfeiture to the use of the said general rate as aforesaid.

5 & 6 Will. 4, c. 20, s. 21. And whereas by the said last recited act certain penalties and forfeitures for offences against the said act are directed to be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, township or place, in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding or division, in which such parish, township, or place, shall be situate, and it is expedient to reward the persons who shall prosecute offenders against the said act; be it therefore enacted, That from

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Will. 4, c. 20, s. 21, the 37th section of the former statute, which disposed of the penalty in the manner directed by the magistrates, is repealed; and the conviction which directs the whole of the money to be paid to the overseer is contrary to the provisions of the last-mentioned statute. It is essential to the validity of a conviction that it contain directions as to whom the penalty is to be paid. *Rex v. Seale (b)*. The 5 & 6 Will. 4, c. 20, s. 21, directs, that one moiety of the penalty shall be paid to the overseer, and the other to the informer. This conviction, then, is uncertain as to the person who is to receive the penalty, since it does not say that there is to be any distribution. [PARKE, B.—Could the overseer give a good discharge for the whole penalty, if the person convicted wanted to come out of prison?] There is no adjudication that the informer is to receive any part of the penalty, and the overseer has no power to share it. [LORD ABINGER, C. B.—The refusal of the party to pay the whole money to the overseer of the parish would not authorize the justice to send such party to prison.] Suppose he paid 1*l.* 10*s.* to the informer under this conviction, he could not get out of prison by paying 1*l.* 10*s.* to the overseer. If a statute directs a penalty to be divided between three persons, who ought in strictness to be named on the face of the conviction, and the justice says that the party convicted shall forfeit 100*l.*, to be applied according to the directions of the statute, that might be a good conviction; but it is not so here. The 21st section expressly requires that one part of the penalty should be paid to the person who should prosecute, and the other moiety only to the overseer; here the direction is, that the whole shall be paid to the overseer. [LORD ABINGER, C. B.—Suppose a person in prison pay 10*s.* 6*d.* to the informer, and 3*l.* to the overseer, would not the overseer be bound to pay 1*l.* 10*s.* to the informer?] Such a payment would not exonerate the party convicted, if the overseer became bankrupt. The plaintiff has been sent to prison, because he refused to pay 3*l.* to the overseer; but the magistrates had no power to order him to pay this money to the overseer, since the second act directs it to be applied in a different way. The Legislature says, You shall alter the form according to the new act, which has not been done; and the plaintiff has been imprisoned for a legal refusal to comply with an illegal order of the magistrates. It may be contended on the other side, that the overseer is to apply it as the law directs, but he is not required by the act to distribute it. This is not a mere defect in form, but a substantial error. *Rex v. Smith (c)*.

*Chilton, Evans, and V. Williams*, in support of the rule. There is no objection in substance against this conviction. By the first statute the amount of the penalty is to be paid to the overseer, or any other officer the justices may think fit to appoint; the next statute says, that one-half shall go to the poor, and the other to the informer, and that the form of conviction under the first statute shall be altered accordingly. That direction is confined

and after the passing of this act one moiety of all such penalties and forfeitures as by the said last recited act are directed to be paid and applied as aforesaid, shall go and be paid to the person who shall inform and prosecute for the same; and the other moiety thereof shall go and be paid to such overseer or officer as aforesaid, and be by him applied in the manner by the said last

recited act directed, and the form of conviction set forth in the said last recited act shall, so far as relates to the distribution of the penalty for which judgment shall be given, be made according to the fact, and conformably with the direction given by this act as to such distribution.

(b) 6 East, 568.

(c) 5 M. & S. 143.

to the application of the penalty; and if this form were altered according to the direction of the subsequent statute, it would be immaterial to adopt it. Suppose the conviction had left out all mention of the overseer, and had awarded that the sum of 3*l.* should be applied according to the direction of the statute, such a form of conviction could not have been found fault with. *Rex v. Liston* (d). The cases relied upon on the other side are, *Rex v. Dimpsey* (e), and *Rex v. Seale* (f): in the former case the magistrates were required to distribute the penalty according to their discretion, and an adjudication that the penalty be disposed of as the law directs "was clearly bad, since the magistrates ought to exercise their discretion as to the distribution; in the latter case the person was entitled to the penalty in consequence of apprehending and securing the offender, and of course the magistrates must point out who has apprehended. Neither the 1 & 2 Will. 4, nor the 5 & 6 Will. 4, leave the distribution of the penalty in the discretion of the magistrates, and it is impossible to say that this conviction does not point out the informer. It awards the sum of 10*s.* 6*d.* for costs, to be paid to *G. J. Harries*, the complainant, which is a sufficient designation of the informer. The money is directed to be paid to the overseer, to be by him applied according to the direction of the statute in such case made and provided; that must mean the statute in force at the time the conviction took place. It is more in favour of the persons convicted if the overseer is to be the hand by which the penalty is to be received than to be obliged to send for the informer. [Lord ABINGER, C. B.—The first statute which gives the jurisdiction is still in force, the second statute merely alters the form of conviction; how do you ascertain which statute the conviction is meant to refer to?] Both statutes must be supposed to be read together. *Daniel v. Philips* (g). In *Rex v. Barrett* (h), the words "according to the form of the statute" were omitted; and therefore the conviction was quashed; so in *Rex v. Chandler* (i), and in *Rex v. Helps* (j), it was necessary to show who the informer was, in order to know to whom the money was to be paid. This is a case in which the form given is merely directory, and the conviction may be drawn up in the most general way it can take effect. The 3 Geo. 4, c. 23, which gives a general form of conviction, does not contain the name of the party to whom the money is to be paid; and if the argument on the other side be applicable, a conviction under the form given by that act would be bad. Though in an award you cannot direct money to be paid to a stranger, yet payment to another as trustee for one of the parties would be good (k). No inconvenience can arise from this form of conviction; the party has only to consult the statute, and apply the penalty according to its directions.

Lord ABINGER, C. B.—I should be glad if I could find any ground on which to support this conviction, since it is undoubtedly a mere mistake of the magistrates. But I cannot. All convictions before magistrates comprise two things: the adjudication of the offence, and the judgment: as to the penalty, if either be imperfect the conviction is bad. If a statute direct money to be paid to a certain individual by name, the magistrate is bound to comply with

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(d) 5 T. R. 338.

(e) 2 T. R. 96.

(f) 8 East, 568.

(g) 1 C. M. & R. 662.

(h) Salk. 381.

(i) Salk. 378.

(j) 3 M. & S. 331.

(k) Roll. Abr. tit. Arbitrament.



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that direction. If the statute simply require the party to forfeit a sum of money, it may be sufficient for the justice to say that he found him guilty of the offence, and that he should pay the penalty according to law; but if a statute direct that justices shall adjudge money to be paid to *A. B.*, and they do not so adjudicate, that conviction is bad. The statute which gives a general form of conviction (*l*) does not help the defendants, because that act only applies to cases where no form is given by a particular statute. The 1 & 2 Will. 4 directs the money to be paid to some one of the overseers of the poor, or such other officer as the justices shall direct: if under this act the conviction omitted to name the officer, it would be bad. The 5 & 6 W. 4 alters the previous act, and directs, that one moiety of the penalty is to be paid to the overseer, and the other to the informer. It is then a necessary part of the judgment of the magistrates that they should award accordingly. It appears to me that this conviction is void. If the Court of King's Bench were to direct a fine to be paid to an individual for the Crown, that would be bad, for no person has a right to receive the money but the Crown.

PARKE, B.—I concur in opinion with the Lord Chief Baron; and also regret that we are under the necessity of discharging this rule, as it is evidently a mere slip of the magistrates, who could hardly be expected to find a clause altering the form of conviction in an act relating to the stamp duties. The omission, however, to comply with the requisites of the act has rendered them liable to the present action. The rule of law is clearly established, that if a conviction be good on the face of it the magistrate is protected; but if it show upon the face of it a want of jurisdiction, or directs an imprisonment of a different nature from that which the magistrate is authorized to award, he is liable to an action. *Groome v. Forrester* (*m*), *Robson v. Spearman* (*n*). Whether, when a conviction is good on the face of it, it may be shown *aliunde* that the justice had not jurisdiction, is a question on which the Court of King's Bench were divided in opinion. Here the defendants have awarded an imprisonment of a different nature from that which they were entitled to do in point of law, namely, until the plaintiff should pay the money to a person not warranted by law to receive it. It is the same as if the conviction had adjudicated the plaintiff to remain in prison until he should have paid the penalty to a perfect stranger. The conviction is under the first statute, the second makes a difference as to the mode of paying and distributing the penalty. If, as contended for on the part of the defendants, the meaning of the latter statute had been, that the penalty was to have been paid to the overseer, and that he should apply one-half to the parish, and the other to the informer, no action could have been maintained; but the true construction of the two sections is, that the penalty is to be divided, in the first instance, one-half to the overseer and the other to the informer. Here, by ordering the plaintiff to pay the whole to a person not entitled to receive it, a different character of imprisonment is put upon the plaintiff than which the magistrates were authorized to award.

BOLLAND and GURNEY, Barons, concurred.

Rule discharged.

(*l*) 3 Geo. 4, c. 23.

(*m*) 5 M. & S. 314.

(*n*) 3 B. & A. 493.

*Eschequer.*

REX v. The SHERIFF of KENT, in the case of POTTER  
v. SIMPSON.

CLARKSON shewed cause against a rule obtained by *Busby* for an attachment against the Sheriff of *Kent*. It appeared that the sheriff, having been ruled to return a writ, had made his return in the following form: "The within named *T. Simpson* is not to be found in my bailiwick." It was submitted, that the words "not to be found" meant that the defendant was not at any time to be found.

A return by the sheriff, that defendant is not to be found in his bailiwick, is bad.

PARKE, B.—This is not a proper and regular return; it should be *non est inventus*; that is, I have not been able to find him at any time between the teste and return of the writ.

ALDERSON, B.—There is good reason for adhering to the common form, since by long usage it has acquired a technical meaning.

BOLLAND, B.—*Non est inveniendus* is not to be found in any precedent.

Rule absolute.

BLUNDELL v. HANSON.

JERVIS shewed cause against a rule obtained by *R. V. Richards*, for setting aside a judgment for want of a plea. The plaintiff declared in chief on the 9th of *January*, indorsed his declaration to plead in four days, and demanded a plea. On the 13th the defendant took out a summons for further time, which was returnable at 3 o'clock on the following day; and at 1 o'clock on the 14th the plaintiff signed judgment. It was contended that the case of *Kemp v. Fyson* (a), upon the authority of which the rule had been obtained, was not law, unless the demand of plea was made when the time for pleading expired (b). By the 8th rule of *H. T.*, 2 Will. 4, time is to be reckoned one day inclusive and the other exclusive; but here the defendant claims four days and a half to plead.

On the 9th of *January* plaintiff delivered a declaration indorsed to plead in 4 days, and demanded a plea. On the 13th, defendant took out a summons for further time, returnable at 3 o'clock on the 14th, and at 1 o'clock on the 14th plaintiff signed judgment:—*Held*, that the judgment was regular.

*R. V. Richards*, *contra*, referred to two cases decided by ALDERSON, B., at Chambers, on the authority of *Kemp v. Fyson*.

PARKE, B.—We decided *Kemp v. Fyson* upon the report of Master *Walker*, who now doubts its accuracy. I know the practitioners are dissatisfied with that case. It is better to abide by the rule of Court; but as that case has misled the defendant, the rule will be discharged without costs.

Rule discharged.

(a) 3 Dowl. p. c. 265.

(b) See R. H. 2 Will. 4, s. 66.

*Exchequer.*

## JONES v. BOND.

The sheriff, or judge, under the Writ of Trial Act, has no power to certify, to deprive the plaintiff of costs, under the 43 Eliz. c. 6, s. 2.

**THIS** was an action for goods sold and delivered, and was tried before the under-sheriff of *Gloucester*; when a verdict was found for the plaintiff, with damages under 40s. Application was made to the under-sheriff to certify, to deprive the plaintiff of costs, under the 43 of Eliz. c. 6, s. 2; but he refused to do so, conceiving that he was not a "judge," or "justice," within the meaning of that act.

*Francillon* moved for a rule to show cause why the plaintiff should not produce the record, and why the under-sheriff should not certify under the 43 Eliz. He contended that the statute of Elizabeth applied to the present case: if it were not so, the 3 & 4 of Will. 4, c. 42, s. 17, had repealed the 43 Eliz. with respect to all actions tried under writs of trial, which could never have been the intention of the Legislature. He admitted that *Wardroper v. Richardson (a)* was against the present application.

LORD ABINGER, C. B.—The statute of Elizabeth does not apply to this case. The words "judges" and "justices" mean the judges and justices of the superior Courts. The sheriff is only an officer of the Court: if the defendant had reason for supposing that the verdict would be less than 40s., that should have been stated as a ground of objection at the time the writ of trial was applied for.

PARKE, B.—The sheriff is not within the meaning of the statute of Elizabeth. At one time it was proposed to insert a clause in the 3 & 4 Will. 4, c. 42, to give the judges upon writs of trial the power of certifying; but it was thought too great a power to entrust to them, considering that it is not the sheriff, but in most cases the under-sheriff who tries the cause. If it be made to appear by affidavit that the plaintiff is suing for a debt under 40s., that would be a good ground for refusing the writ of trial.

Rule refused.

(a) 1 A. & E. 75.

## CARRINGTON v. ROOTS.

To trespass for seizing and impounding plaintiff's horse and cart, defendant pleaded that they were encumbering and doing damage to his close and grass. Plaintiff replied, that defendant agreed to sell, and sold to the plaintiff, and that plaintiff agreed to buy, and then bought of defendant the grass in the said close, with liberty to enter with his horse and cart to take away the same:—*Held*, that the plaintiff was bound to prove a valid contract binding in law; and as the contract in question was not in writing, it was not available in support of the replication; *Acid* further, that this contract might have been pleaded as a license.

**TRESPASS** for seizing, taking, and impounding plaintiff's horse and cart. Pleas: *first*, not guilty; *secondly*, as to seizing and taking the cart, that defendant was in possession of a certain close, and of the grass and herbage there growing, and because the cart was wrongfully upon the said close, encumbering the same, and doing damage there to the defendant, he the defendant, at the said time, when, &c. seized and took the cart, and removed the same to a convenient distance for the use of the plaintiff, as he lawfully

to trespass for seizing and impounding plaintiff's horse and cart, defendant pleaded that they were encumbering and doing damage to his close and grass. Plaintiff replied, that defendant agreed to sell, and sold to the plaintiff, and that plaintiff agreed to buy, and then bought of defendant the grass in the said close, with liberty to enter with his horse and cart to take away the same:—*Held*, that the plaintiff was bound to prove a valid contract binding in law; and as the contract in question was not in writing, it was not available in support of the replication; *Acid* further, that this contract might have been pleaded as a license.

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might: *thirdly*, as to taking and impounding the plaintiff's horse, that defendant was possessed of a certain close, and because the said horse was wrongfully in the close of the defendant, eating and depasturing the grass and herbage of the defendant there then growing, and doing damage there to the defendant, the defendant at the said time, when, &c. seized and took the said horse and impounded the same. To each of these pleas the plaintiff replied, that whilst the said close and grass in those pleas mentioned were the close and grass of the defendant, he the defendant agreed to sell and then sold to the plaintiff, and he the plaintiff agreed to buy, and then bought of the defendant the said grass for a certain sum, to wit, the sum of 5*l.* 10*s.* per acre, with liberty for the plaintiff to cut and take away the same, and for that purpose with his horse and cart to enter into the close; and that plaintiff entered by virtue of that contract: Rejoinder, that defendant did not agree to sell, nor sold, nor did plaintiff agree to buy, nor bought the said grass, with liberty for the plaintiff to cut and take away the same, and for that purpose with his horse and cart to enter into the said close *modo et forma*. At the trial before Gurney, B., at the sittings in *Middlesex*, it appeared that the plaintiff, who was a milkman, had agreed with the defendant by parol, in the month of *May*, to purchase of him the crop of grass then growing in his close, and also the after-grass, which the plaintiff was to be at liberty from time to time to take away. On the part of the defendant it was submitted, that as this was a contract for the purchase of an interest in land, it ought to have been in writing; and also that there was a variance between the contract stated in application and that proved in evidence, the contract on the pleadings being within the seventeenth section of the Statute of Frauds, and that proved in evidence falling within the fourth section. The learned judge refused to nonsuit, but left the case to the jury, who found a verdict for the plaintiff, a rule having been obtained last Term to set aside the verdict and enter a nonsuit.

*Erle* and *Chandless* shewed cause. The question turns upon the fourth and seventeenth sections of the 29 Car. 2, c. 3. The evidence shewed a contract for the purchase of an interest in land; *Crosby v. Wadsworth* (a). In those cases in which it has been held that the sale of a crop is not the sale of an interest in land, the thing sold has formed no part of the inheritance, but has been a specific standing crop; *Roberts v. Evans* (b). In *Smith v. Forman* (c), it was considered to be a sale of timber after the trees had been felled, and the judgment of the Court proceeded on that ground. If there had been a sale of growing trees, it would have been an interest in land; *Scorell v. Boxall* (d). This agreement, then, does not fall within the penalty of the seventeenth section, which renders the contract altogether void; but is within the fourth section, which only precludes the bringing an action to enforce the agreement; for other purposes it is good and valid. The 21 Jac. 1, c. 16, s. 3, prevents the suing for a debt after six years, yet the contract is not dissolved, and if the creditor have a lien he may insist upon it. No action can be brought to recover a debt for spirituous liquors, unless contracted at one time to the amount of 20*s.* (24 Geo. 2, c. 40, s. 12); but, though no action can be maintained, the debt is not void; *Cruikshanks*

(a) 6 East, 602.  
(b) 5 B. & C. 829.

(c) 9 B. & C. 561.  
(d) 1 Y. & J. 396.

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v. *Rose* (e). If the object of the present action were to get the benefit of the contract, the form of action would not alter the case; but the plaintiff does not seek to enforce the agreement, but merely states a fact in answer to the defendant's justification of his tortious conduct.

*Greenwood*, in support of the rule. The prohibitory language of the fourth section extends as well to a defence as to an action. A debt barred by the statute of limitation cannot form the subject of a set-off, *Remington v. Stevens* (f); nor will it support a commission of bankruptcy, *ex parte Dewdney* (g). A direction in a will to pay all debts does not extend to a debt barred by the statute of limitation (h). Wherever a statute says that no action shall be brought, the contract is not available for any purpose. *Scott v. Gillmore* (i) decided, that a bill of exchange, part of the consideration for which was spirituous liquors sold in less quantities than 20s. value, and part money lent, was wholly void. Any argument that might be drawn from the different language of the fourth and seventeenth sections is weakened by the distance between the two and the different matter which is interposed. The principle of the act applies as well to one section as another. In *Thomas v. Williams* (j), the plaintiff's tenant being unable to discharge his rent, the defendant, an auctioneer, was about to sell his goods on the premises. The plaintiff came then and required security for his rent; and the defendant promised, that if he would allow the sale to proceed he would pay, not only the rent then due, but also the next quarter's. It was held, that the promise to pay the accruing rent was within the fourth section of the Statute of Frauds, and that as the promise was entire, the whole contract was void. Suppose the plaintiff had brought trespass for cutting and carrying away the grass, he must have been nonsuited; *Scorell v. Boxall* (k). If no action can be brought to enforce this contract, it is not available as a defence. The contract stated in the replication falls within the seventeenth section, but that proved in evidence was a contract for the sale of an interest in land within the fourth. Looking at the record, it would seem the parties meant a contract for the purchase of a crop as contradistinguished from any interest in the land; *Evans v. Roberts* (l). The plaintiff's right to enter the land is expressly traversed; *Heath v. Milward* (m). *Hallen v. Runder* (n) recognises the principle laid down by *Littledale, J.*, in *Evans v. Roberts*.

LORD ABINGER, C. B.—If the contract in question is for the sale of a chattel interest, it is void under the seventeenth section. Supposing that to be a matter of doubt, I for one should be inclined to think it bears the character of a contract to obtain an interest in land, and therefore falls within the fourth section. The question is, whether the fourth section, which declares that no action shall be maintained upon such a contract unless in writing, means that the contract shall be available for other purposes as a contract, except having an action brought upon it. Though it cannot be available as a contract unless an action can be brought upon it, yet what is done under

(e) 2 M. & M. 100.  
(f) 2 Str. 1271, B. N. P. 180.  
(g) 15 Ves. 479.  
(h) 2 Rose.  
(i) 3 Taunt. 226.

(j) 10 B. & C. 664.  
(k) 1 Y. & J. 396.  
(l) 5 B. & C. 829.  
(m) 2 Bing. N. c. 98.  
(n) 1 C. M. & R. 277.

it may admit of some apology and excuse: for instance, if a party sells a house and lets the vendee into possession before the agreement is signed, he could not maintain trespass against the vendee in possession; although the latter could not enforce the contract. In any case where an action is brought it can only be maintained on the supposition that the contract is binding. If the whole of the plaintiff's case had been set forth, and he had claimed the right of exemption of his cart being taken, and bringing the action because he had a right of putting his cart there, that would be a collateral mode of taking the benefit of a contract when he could not directly enforce it. What is the meaning of the replication? It states a contract, which must be an available contract to give the party any right; and to say it gives a right is only to say that the right may be enforced by action. In effect the meaning of the replication is, that there is a lawful contract upon which the plaintiff can claim a right; and the evidence shows that there was not a lawful contract. It is quite another question to say that if an action of trespass had been brought against the plaintiff he might not have pleaded this as a licence. This would be a licence if not countermanded, and a plea that defendant put his cart on plaintiff's close, for the purpose and in order to take away the crop of grass, might have been available for the purpose of a licence, in answer to an action brought by defendant. That would not be setting up the contract, but would be only matter of excuse, which would take from the defendant the right of maintaining trespass, because the act was done with his consent. That appears to me the utmost extent to which the plaintiff could avail himself of this contract. I am therefore of opinion that this replication is not sustained.

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PARKE, B.—I am of the same opinion. The declaration is for seizing a horse and cart; the defendant pleads that he was possessed of a close and of a crop of grass, and that he took the horse and cart because they were encumbering the close and doing damage there. The plaintiff replies, that whilst the defendant was possessed of the close he agreed with the plaintiff to sell him the crop of grass; that by virtue of that contract the plaintiff entered, and defendant wrongfully refused possession. That last circumstance is not material in putting a construction upon the contract, whether the plaintiff by that averment only means an agreement in fact, as a licence, or a binding agreement, which would give him an interest in the crop, it is just the same if that averment were omitted. The question is, what the plaintiff means when he avers an agreement for the purchase of a crop of grass, with liberty to enter the land to cut the grass, whether he simply means a licence or a binding contract for a valuable consideration. I am of opinion that the latter is the true construction, and that he means a binding agreement in point of law, and which one party can enforce against the other as a matter of right. If the purchase is of a chattel interest, that is not the contract proved. If the purchase is of an interest in land, it is not binding, and cannot be enforced on either side. There is no doubt the agreement is in fact a licence to enter on the land, and might have been so pleaded. The true construction of this replication is, that the plaintiff had a right to enter by virtue of that contract, but such right has not been proved.

Rule absolute.

C

*Eschequer.*

## NORMAN v. WESTCOMBE.

To trespass for breaking and entering plaintiff's dwelling-house, defendant pleaded that one *W. F.* was his tenant at a certain rent, and that he had fraudulently removed his goods to the plaintiff's house to avoid a distress, and defendant justified an entry under a warrant to search for the goods: Plaintiff new assigned, that the trespasses were committed on a different part of the same day: defendant pleaded a similar justification:—*Held*, that the new assignment was not an admission of the facts stated in the plea to the declaration, and therefore defendant could not make use of them in support of his plea to the new assignment.

**TRESPASS** for breaking and entering the plaintiff's dwelling-house.

*Plea*:—That one *W. Freaton*, long before and at the said time when, &c., held and enjoyed a certain dwelling-house, with the appurtenances, as tenant thereof to the defendant, under and by virtue of a certain demise thereof before then made by the defendant to the said *W. F.*, upon which demise a certain yearly rent was reserved: that just before the said time when, &c. the sum of 8*l.* of the rent aforesaid was due and owing from the said *W. F.* to the defendant, and from thence until and at the said time when, &c. continued due and in arrear: that after the rent became due, and within thirty days before the said time when, &c. the said *W. F.* fraudulently and clandestinely removed his goods and chattels from the premises so held and enjoyed by him as tenant to the defendant, and conveyed the said goods and chattels to the dwelling-house in which, &c., to prevent the defendant from distraining the same for the said rent in arrear, without leaving any other goods whereon the defendant could distrain: that defendant requested plaintiff to allow him to search his house, in order to distrain the goods so fraudulently removed as aforesaid, which plaintiff refused to do; whereupon the defendant obtained a search-warrant from a magistrate, and entered the plaintiff's house under that warrant, which was the trespass complained of. The plaintiff new assigned, that upon another and different part of the same day defendant broke and entered his dwelling-house. To this new assignment the defendant pleaded the tenancy of *W. F.*; that 8*l.* was in arrear for rent: that *W. F.* had fraudulently removed his goods to the plaintiff's house to avoid a distress, and that defendant entered to take the goods. The plaintiff replied *de injuria*.

At the trial before *Bolland, B.*, at the last assizes for the county of *Somerset*, it appeared that *W. F.*'s goods had been removed to the plaintiff's house to avoid the distress; but no evidence was produced on the part of the defendant to show that *W. F.* was his tenant at a reserved rent, or that any rent was due; it being submitted by the defendant's counsel that those facts were admitted by the new assignment to the first plea.

A verdict having been found for the defendant, *Crowder*, in last *Michaelmas* Term, obtained a rule *Nisi* to set aside the verdict on the ground that there was no evidence in support of the plea to the new assignment.

*Erle* showed cause. There is an admission of a tenancy on the record, which is *primâ facie* evidence of the defendant's right to distrain. A plea to a new assignment and a plea to a declaration are not collateral pleas, but continuous proceedings. If a defendant suffer judgment by default to a new assignment, and leave upon the record a plea of not guilty to the declaration, the damages cannot be assessed before the sheriff, but the plaintiff must go to trial; and the reason is, that the new assignment is virtually contained in the new declaration (a). In *Wm.'s Saund.* (b) it is stated, that where the plaintiff

(a) *House v. The Thames Commissioners*, 3 B. & B. 117; *Rag v. Wells*, 8 Taunt. 129.

(b) Vol. I. 299; 1 *Wm.'s Saund.* 300, (b) n.

brings an action of assault he cannot now assign unless there have been two assaults at least committed upon him, for the new assignment is an acknowledgment by the plaintiff that the defendant has justified one assault. There is a distinction between a collateral and a continuous series of pleas. Suppose the case of trespass for breaking and entering the plaintiff's close, to which the defendant pleads a right of way, and the plaintiff replies *extra viam*, the defendant will be at liberty to use that replication as an admission of a right of way. So, if the plaintiff brought two separate actions for breaking and entering his dwelling-house, to one of which the defendant pleads an entry under a magistrate's warrant, as in the first plea; and to the other the same plea as to this new assignment, if the jury found a verdict for the defendant upon his justification under the warrant, he might make use of that record, being between the same parties, in proof of the plea in the other action, and show by parol evidence that the premises were the same. Take the case of an action on a bill of exchange, the consideration for which was goods sold: if the defendant plead payment to the count for goods sold, and the plaintiff admits that plea and enters a *nolle prosequi*, the defendant would be at liberty to show that the consideration of the bill was the goods sold, for which the plaintiff has admitted he has been paid.

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*Crowder and Ball* in support of the rule. It is a fallacy to suppose that a new assignment admits the facts alleged in the plea. It only amounts to this: the plaintiff, in general language, says, You have committed a trespass by coming into my house and staying a long time there. Defendant says, I suppose you mean when I entered under a warrant to search for goods which had been fraudulently removed by my tenant. The plaintiff then says, It is not on that account I bring my action, but because you entered at another and a different time. In the case first put there is a distinct admission of a right of way, and the cause of complaint is, the going out of that way; but here there is not the least connexion in one of these pleas with the other. There is no doubt that if the plaintiff brought two separate actions for different trespasses, and to one of these actions the defendant justified under a warrant, and that plea is found for him, the actions being between the same parties, the facts found in the one might be used in evidence in the other action. But here the plaintiff waives all inquiry as to whether the plea to the declaration is a good justification, and goes on to state the real ground of his action. In the other case of an action upon a bill and for goods sold, there would not be a conclusive admission of payment for the goods, unless that fact were found by a jury. Here there is no admission which amounts to a *nolle prosequi*, for the plaintiff says, I have not brought my action, and never did intend to bring it, for that which you suppose, but for a totally different cause.

LORD ABINGER, C. B.—This case has been very ingeniously argued; and a doubt was raised in my mind upon a point on which I entertained no doubt in the beginning. If, where the plaintiff declares with two separate counts, in one of which he distinctly admits certain facts, and a question is raised upon the other involving similar facts, it may be a matter of consideration whether the facts admitted by the first count might not be used in evidence of the same facts in the second. If the question had been put to me origi-



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nally I should have said, at first, it was doubtful whether they could be. But I am not prepared to say that a verdict or a distinct admission of a particular fact may not be evidence upon another record between the same parties. There seems to me, however, a difference in the present case. A new assignment does not amount to an admission of a fact; it is simply a statement by the plaintiff that he does not mean to investigate at all that subject-matter to which the defendant's plea applies. Suppose an action of assault, and the defendant justifies on the ground that the plaintiff was trespassing on his land; suppose also that before the plaintiff came upon the land the defendant had thrashed him; here the plaintiff would say, I will not go upon that plea, and try whether it is your land or not, I commenced by action for another assault upon the same day; and if the defendant plead to this, that the plaintiff was then going to the defendant's land, and he was endeavouring to prevent him, could the defendant make use before the jury of the admissions of the former plea? In point of fact, there is no admission on the record, but a mere declaration that the plaintiff does not proceed for that trespass which the defendant has justified. Suppose further, a plaintiff has embraced in his count several matters, to one of which the defendant has pleaded a justification which the plaintiff cannot deny, and he obtains an order to strike that part out of the count, and goes to trial upon the other matters, the state of the pleadings will have no reference to the part struck out. Here the pleadings previous to the new assignment are in point of fact struck out: the plaintiff says, You are mistaken, that is not what I mean to go for; but I go for this; and defendant has no right to make use of them.

PARKE, B.—When this motion was made there was no doubt in my mind; but a doubt has been since raised by the ingenious argument of Mr. Erle. I was led into the doubt by taking for granted the position he commenced with, viz., that a new assignment admits the truth of the matter pleaded in justification. But if the nature of a new assignment be examined, it is sufficiently clear that its only operation is to admit there is another trespass than that complained of, any inquiry as to which the plaintiff relinquishes. It amounts to this: I will not upon this occasion make any inquiry into the truth of the plea; that is not the cause for which I brought my action. It is clear, then, you cannot take this as an admission to prove a subsequent state of the pleadings.

BOLLAND and GURNEY, Barons, concurred.

Rule absolute for a new trial.

### GRANGER v. MOORE.

Where a writ of *capias* is lodged with the sheriff against a person in his custody on a criminal charge there is no necessity for an order of the Court upon the sheriff to detain the defendant.

THE defendant in this case was in *Horsemonger-Lane Gaol*, in the custody of the sheriff on a criminal charge, which custody would expire on the following day.

Where a writ of *capias* is lodged with the sheriff against a person in his custody on a criminal charge there is no necessity for an order of the Court upon the sheriff to detain the defendant.

*Humfrey* moved for an order commanding the sheriff to detain the defendant on a writ of *capias*, at the suit of the plaintiff.

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LORD ABINGER, C. B.—There is no necessity for an order of the Court. If a writ of *capias* be lodged with the sheriff, and he afterwards allows the defendant to go beyond the prison walls, he may have an action against him for not doing his duty. It is a different case where you seek to charge the defendant with a proceeding when the cause is pending.

*Humfrey* stated that it was the general practice to apply for orders of this description, and they were frequently made at Chambers, but he understood that in term time it was necessary to make an application to the Court.

LORD ABINGER, C. B.—I am informed by the officer there is no such rule in this Court. I have sent to ascertain the practice in the Court of King's Bench; and they report that the rule applies to persons in the custody of the marshal; but that is a different case from this; here the defendant is in the custody of the sheriff himself, and I cannot conceive upon what principle the sheriff should have an order of the Court.

The other judges concurred.

#### FIELD v. HEMMING.

*ASSUMPSIT* by payer against maker of a joint and several promissory note, dated the 10th day of November. The defendant pleaded that he did not make the note. Previously to the trial the plaintiff had obtained a judge's order to admit the handwriting to the note, pursuant to R. H. T., 4 W. 4., 20, but in the notice he had described the note as "a joint and several promissory note made by the defendant and one T. Bonaston, for 200l., payable to the plaintiff on the 10th day of October." The defendant's attorney at first refused to admit the handwriting, but afterwards consented to an order for that purpose. At the trial before Lord Abinger, C. B., at the last sittings in *Middlesex*, the plaintiff produced the note, and the judge's order, but gave no evidence of the defendant's handwriting. It was then objected by the defendant's counsel that an admission of a note described to be made on the 10th of October, was no evidence of the note set out in the declaration. A verdict was found for the plaintiff for the amount of the note, with liberty to move to enter a nonsuit.

In a notice to admit the handwriting to a promissory note which was annexed to the notice, the note was described as bearing date the 10th of October instead of the 10th of November. The defendant consented to an order for the admission of the handwriting of the note described in that notice; at the trial no evidence was produced but this order. A verdict having been found for the plaintiff, the Court refused a rule to set aside the verdict.

*Humfrey* now moved accordingly, and contended that there was no evidence to support the plaintiff's claim. The defendant had only admitted the handwriting to a note made on the 10th of October. The judge had no power to make an order for the admission of any document except that which was specified in the notice.

LORD ABINGER, C. B.—It appeared that the promissory note was annexed to the notice; the defendant must therefore have known the particular note, the handwriting to which he was called upon to admit; consequently there is

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HEMMING.

no ground for saying he was misled. The question seems to be, whether or no the plaintiff is at liberty to show a mistake. Suppose a person upon receiving ten pounds gives a receipt for twenty, may he not shew that he has received but ten? The intention of the defendant was to admit the handwriting to a promissory note, the original of which was annexed to the notice.

Rule refused.

### WALLIS v. DAY and another.

Plaintiff assigned the good-will of his business as a carrier to defendants, and covenanted with them not to carry on trade on his own account *during life*, and also to serve defendants for life, and defendants covenanted with plaintiff to pay him a certain weekly sum:—*Held*, that the contract not to trade during life was legal.

When a deed contains several independent covenants, some of which are illegal and void, the others may nevertheless be enforced.

**COVENANT.**—The declaration stated that by a certain indenture made between the plaintiff of the one part, and defendants of the other part, (*profert*) for considerations therein mentioned, the defendants did for themselves, their heirs and executors, jointly and severally covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that they the defendants, or one of them, their, or one of their heirs, executors, or administrators, should and would well and truly pay, or cause to be paid, unto the plaintiff, his executors, administrators, and assigns, for the terms of fifteen years, to commence from the day of the date of the said indenture if the plaintiff should so long live, the weekly sum of 2*l.* 3*s.* 10*d.* of lawful money of Great Britain, free from all taxes and other deductions whatsoever: the first weekly payment thereof to begin and be made on the 10*th day of July* next ensuing the date of the said indenture: averment that plaintiff had well and truly performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept; and although fifteen years from the day of the date of the said indenture have not yet elapsed, yet the said plaintiff saith that the said defendants have not, nor hath either of them paid or caused to be paid to the said plaintiff the said weekly sum of 2*l.* 3*s.* 10*d.*, but have neglected and refused so to do; and there is now due and owing to the said plaintiff a large sum of money, to wit, the sum of 39*l.* 9*s.* of the weekly payments aforesaid, for eighteen weeks before the commencement of this suit, elapsed, and up to, and ending on the 22*nd day of October*, in the year of our Lord 1836. The defendants craved *oyer* of the indenture, which was as follows:—This indenture, made the 8*th day of July*, in the year of our Lord 1830, between *William Day*, of *Walsoken*, in the county of *Norfolk*, wagoner, on the one part, and *Edmund Clemenson*, of *Saint Ives*, in the county of *Huntingdon*, wagoner, and *James Wallis*, of *Saint Ives* aforesaid, wagoner, of the other part: whereas the said *James Wallis* hath for many years past carried on the trade or business of a carrier from *London* to *Saint Ives*, and from thence to *Wisbech*; and whereas the said *James Wallis* hath agreed with the said *William Day* and *Edmund Clemenson* for the sale, disposition, or relinquishment to them of the said trade or business of the said *James Wallis* upon the terms and conditions hereinafter expressed; now, therefore, this indenture witnesseth, that in pursuance of the said agreement, and in consideration of the covenants, stipulations, and agreements hereinafter contained, on the parts and behalves of the said *William Day* and *Edmund Clemenson*, and in consideration of the sum of 10*s.*, of lawful money of *England*, to the

said *James Wallis*, in and at, or immediately before the execution of these presents, well and truly paid by the said *William Day* and *Edmund Clemenson*, (the receipt whereof is hereby acknowledged,) he the said *James Wallis* hath granted, bargained, sold, assigned, relinquished, and quit-claimed, and by these presents doth grant, bargain, sell, assign, relinquish and quit-claim unto them, the said *William Day* and *Edmund Clemenson*, their executors and administrators, all and singular the good-will, interest, and advantage of the connexions and customers whatsoever, which the said *James Wallis* now hath in or concerning the said trade or business of a carrier from *London* to *Saint Ives*, and from thence to *Wisbech*, as the same hath been and now is carried on, exercised, or enjoyed by him the said *James Wallis*; and all the estate and interest of the said *James Wallis* therein; to have, hold, and enjoy the said good-will, trade, or business, and other the premises hereinbefore assigned, or otherwise assured, or intended so to be, unto and by them the said *William Day* and *Edmund Clemenson*, their executors, administrators, and assigns, to and for their own proper use, benefit, and advantage. And the said *James Wallis*, for the considerations hereinbefore expressed, and in consideration of the covenants hereinafter contained on the parts and behalves of the said *William Day* and *Edmund Clemenson* respectively, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said *William Day* and *Edmund Clemenson*, their executors, administrators, and assigns, by these presents in manner following; that is to say, *that he the said James Wallis shall not, nor will at any time from henceforth, during the term of his natural life, either by or for himself, or for or with any other person or persons whomsoever in trust for him, or to or for his use, benefit, or advantage, set up, exercise or in any sort or manner howsoever use or follow the trade or business of a carrier, except as hereinafter is excepted.* And further, that he the said *James Wallis* shall and will from time to time, and at all times hereafter, during the term of his natural life, to the utmost of his power, promote and encourage the customers and connexions in trade of him the said *James Wallis* being or becoming the customers of the said *William Day* and *Edmund Clemenson* in the said trade or business; and that it shall be lawful for the said *William Day* and *Edmund Clemenson* from time to time, and at all times hereafter, to wait upon all or any of the present customers or customer of him the said *James Wallis*, in the name of the said *James Wallis*, as often as they or either of them shall think fit, or find occasion so to do. And moreover, that the said *James Wallis* shall and will from henceforth, during the term of his natural life, well, truly and faithfully serve the said *William Day* and *Edmund Clemenson* as an assistant in the said trade or business of a carrier, and diligently attend to the business and concerns thereof during the usual hours of business; and shall not nor will do any wilful damage or injury to the said *William Day* and *Edmund Clemenson*, nor knowingly suffer the same to be done without acquainting them the said *William Day* and *Edmund Clemenson* therewith. And this indenture further witnesseth, that for the considerations hereinbefore expressed, and of the covenants hereinbefore contained, and in consideration of the good and faithful service of the said *James Wallis* as aforesaid, they the said *William Day* and *Edmund Clemenson* do hereby for themselves, their heirs and executors, jointly and severally covenant, promise, and agree to

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and with the said *James Wallis*, his executors, administrators, and assigns, in the manner following; that is to say, that they the said *William Day* and *Edmund Clemenson*, or one of them, their, or one of their heirs, executors, or administrators, shall and will well and truly pay or cause to be paid unto the said *James Wallis*, his executors, administrators, and assigns, for the term of fifteen years, to commence from the day of the date hereof, if the said *James Wallis* shall so long live, the weekly sum of 2*l.* 3*s.* 10*d.* of lawful money of Great Britain, free from all taxes and other deductions whatsoever; the first weekly payment thereof to begin and be made on the 10*th* day of *July* next ensuing from the dates of these presents; and in case of the death of the said *James Wallis* on any day before any weekly payment of the said sum of 2*l.* 3*s.* 10*d.* shall become due, then a proportionate part of the said weekly sum of 2*l.* 3*s.* 10*d.*, to be computed from the end of the week immediately preceding the day of the decease of the said *James Wallis*; and if the said *James Wallis* shall be living at the expiration of the said term of fifteen years, then the said *William Day* and *Edmund Clemenson*, or one of them, their, or one of their heirs, executors, or administrators, shall and will well and truly pay, or cause to be paid unto the said *James Wallis*, his executors, administrators and assigns, for and during the then remainder of the natural life of the said *James Wallis*, the weekly sum of 1*l.* 8*s.* 10*d.* of like lawful money, free from all taxes and other deductions whatsoever; the first weekly payment thereof to begin and be made the first *Saturday* immediately after the expiration of the said term of fifteen years; and in case of the death of the said *James Wallis* before any weekly payment of the said sum of 1*l.* 8*s.* 10*d.* shall become due, then a proportionable part of the said sum of 1*l.* 8*s.* 10*d.* to be computed from the end of the week immediately preceding the death of the said *James Wallis*.

*Demurrer and joinder.*

*F. Kelly*, in support of the demurrer.—The effect of this covenant being to restrain the plaintiff from trading at all during his life, is a general covenant in restraint of trade, and therefore void. The covenant is absolute and unconditional, and it would be no defence to say that the plaintiff had not performed any service. If the service were the only consideration it might be otherwise; but here is a covenant not in consideration merely of another covenant affirmative in its nature, but in consideration of several things, some affirmative and some negative. If a covenant on one part be negative, and an affirmative covenant on the other part be in consideration of the performance thereof, though the negative covenant be broken, yet the affirmative covenant ought to be performed, *Hunlocke v. Backlowe* (a). The plaintiff expressly restrains himself from trading during his natural life. [Lord Abinger, C. B.—Is it not lawful for a man to contract to serve another during his life? Parke, B.—Suppose a covenant on the one part not to marry during life, and in consideration thereof a covenant to allow one hundred pounds during life, could it be said that such a covenant is void?] It is clearly established that in order to support a restraint of this description it must be reasonable, and founded on an adequate consideration, *Chesman v. Nainby* (b), *Homer v. Ashford* (c), *Young v. Timmins* (d); but here is

(a) 2 Wm.'s Saund. 155 (a).  
 (b) 2 Str. 739.

(c) 3 Bing. 322.  
 (d) 1 Y. & J. 331.

an absolute covenant on the part of the plaintiff not to carry on business during life, and the defendants covenant to pay him a sum of money. If, therefore, the defendants left off trade the plaintiff would be compelled to remain idle all his life. So if the defendants were to become bankrupt, and unable to pay the money, the plaintiff would nevertheless be bound to perform his covenant, though he should receive no part of the consideration. The plaintiff then is entirely at the mercy of the defendants; the agreement is productive of no advantage to him, and the public are deprived of his labour. In *Homer v. Graves* (e), the defendant, a moderately-skilled dentist, covenanted that he would abstain from practising over a district of 200 miles in consideration of receiving instructions, and a salary from the plaintiff determinable at three months' notice, and this was held unreasonable and void. *Tindal*, C. J., in delivering judgment in that case, says, "We do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either—it can only be oppressive, and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the grounds of public policy." In former times the judges spoke of these agreements with great disapprobation. *Hall*, J., says (2 H. 5. fol. 5), "A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encountre common ley, et per Dieu si le plaintiff fuit icy, il irra al prison tanq; il ust fait fine au Roy." And in *Mitchell v. Reynolds* (f) *Parker*, C. J., said he thought the occasion excused the vehemence of *Hall*. *Bunn v. Guy* (g) is most favourable to the other side, but that case does not touch the principle that when the covenant is in general restraint of trade it is void. If then the covenant is void, it avoids everything that is given in consideration of it.

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*Wightman*, in support of the declaration.—The question is, whether if there are several independent covenants, one of which is void at common law, the plaintiff may not recover upon the others. A distinction has been taken between contracts illegal by statute, and illegal at common law. If illegal by statute, the contract is altogether void; but if illegal at common law, the Court must separate the one part from the other. *Pigot's case* (h), *Norton v. Simmes* (i), *Fetherston v. Hutchinson* (j), *Newman v. Newman* (k), *Greenwood v. Bishop of London* (l).

But this contract is not illegal. The result of the authorities is, that contracts in general restraint of trade are bad in law, as being contrary to public policy; but if there be any qualification of the restraint, the contract is good if founded on an adequate consideration. In the present case there is no absolute restraint from trading, but the plaintiff is confined in his mode of carrying on business, he is only to carry it on as assistant to the defendants. The public has the full benefit of his talents if he chooses to exercise them, and he is provided for during his life. In *Young v. Timmins* there was no

(e) 7 Bing. 735.

(f) 1 P. Will. 181.

(g) 4 K. 190.

(h) 11 Rep. 27 (b).

(i) Hob. 14.

(j) Cro. Eliz. 199.

(k) 4 M. & S. 66.

(l) 5 Taunt. 727.

*Eschequer.* adequate consideration ; but in the present case the defendants are at all events bound to pay plaintiff for the whole of his life, and admitting it to be a partial restraint, it is founded on an adequate consideration.

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*F. Kelly*, in reply.—A contract to serve for the whole term of life is contrary to public policy ; the party ties himself up and deprives himself of the reward of his diligence and perseverance. This is in effect a covenant against a statute, for in *Mitchell v. Reynolds* it is said that restraints in trade are in direct infringement of magna charta. The cases cited are different from this, for here you cannot separate the legal from the illegal part,—it is a contract to pay a sum of money in consideration of three different things,—it is impossible to say how much is the consideration for relinquishing the business, how much for the services, or how much for the trade.

*Cur. adv. vult.*

Lord ABINGER now delivered the judgment of the Court. This was an action on a covenant, by which the defendants bound themselves to pay the plaintiff a weekly sum. The defendants cravedoyer of the deed, by which it appeared that the plaintiff had been a carrier, and that the defendants being desirous of setting up that trade, entered into a contract with the plaintiff to purchase the good-will of his business, and to take him into their service at a weekly salary, and the plaintiff covenanted with the defendants to refrain from carrying on the business of a carrier on his own account during his life. The defendants after setting out the deed demurred, on the ground that as the covenant in restraint of trade was illegal, the whole contract was void, and no action could be maintained. We cannot however accede to that proposition. If a party make several covenants, one of which cannot be enforced, he is not precluded from performing the others, and in the present case the defendants might have maintained an action against the plaintiff for not rendering them the services, there being nothing illegal in that part. In answer it is said, that as the contract is to serve for life, it is illegal. There is no authority for that position, and I know of no principle that makes it so: on the contrary, my brother *Parke* has referred me to a case in *Viner (m)*, in which it is laid down, that in order to maintain an action against a person who contracts to serve for life, the contract must be by deed. In the course of the argument it was doubted whether a contract to carry on partnership, and not trade during that partnership, would not be illegal. This Court has decided the reverse in the case of *Wickens v. Evans (n)*. There the contract for life was binding, and there is no authority for saying that if a party enter into a contract to serve for life with a partner, and to restrain himself from being a partner with any other firm for life, such contract is bad. The judgment of the Court in favour of the plaintiff is sufficiently sustained by the authorities cited, and especially *Mitchell v. Reynolds*. The rule of law is this, that a contract in general restraint of trade is void, as being against the policy of the law ; but if the contract be made upon sufficient consideration, and the public gain some advantage, it will be good ; in other words, where there is a naked contract without any consideration by which a party binds himself

(m) Vin. Abr. Master & Servant (n) 5.

(n) 3 Y. & J. 318.

to refrain from carrying on trade any where, it is void in law; but such a contract may be made under circumstances which show that the public have a good consideration by such contract. Suppose a man engaged in trade is desirous, when old age approaches, of selling the good-will of his business, he may bind himself to enter into the service of another, and to trade no more on his own account: so long as he is able, he is bound to render his services, and it cannot be said to be a contract in restraint of trade when there is a contract to serve another for life. Upon these grounds we think there is a sufficient consideration to take this case out of the general rule.

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Judgment for plaintiff.

### LINDUS v. POUND.

**M**ANSEL showed cause against a rule obtained by *Humfrey* calling on the defendant to show cause why the demurrer to the second count of the declaration should not be set aside for irregularity. The objection was that the matter of law intended to be argued was not stated in the margin of the demurrer, as required by the second rule of H. T., 4 W. 4. *Mansel* contended that the rule was never intended to apply to a special demurrer, and it had been so decided at Chambers. In the case of *Neek v. Kent*, which was a demurrer to a replication *de injuria*, *Patteson, J.*, said that it was considered that the rule only applied to general demurrer. There was also a case of *Mabbot v. Allen* at Chambers, in which a like decision was given.

The second rule of H. T., 4 W. 4, applies as well to special as to general demurrers; but if the demurrers be special, it is sufficient to refer in the margin to the causes assigned.

**PARKE, B.**—The rule applies as well to special as to general demurrers. If the demurrer be special, it is sufficient to refer in the margin to the matter specially assigned as causes of demurrer.

Rule absolute.

### LAD v. LYNN.

**T**HE first count of the declaration alleged that differences existed between the defendant and his wife *Martha*, and that they were living apart from each other, and it was desired by them, and particularly by the defendant, that they should continue to live separate, and that a deed of separation should be prepared, and for effecting such desire and purpose it was expedient and necessary that some person should join and become a party for the said *Martha*, and thereupon, in consideration the plaintiff would join and become a party to such deed as such trustee, the defendant promised to pay the plaintiff such costs as he might and should reasonably incur in arranging the proper terms of the deed, and in causing a proper deed to be prepared and settled on his part as such trustee, and in the execution thereof by him.

A counterpart of a deed of separation is not such a necessary for the wife as to entitle her trustee to sue the husband for the costs of it.

**Averment:** that plaintiff caused a formal deed of separation to be prepared on his part as such trustee, which he executed; that the costs thereof



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amounted to a large sum of money, but the defendant had not paid the same. There were also counts for money paid and money due on an account stated. At the trial before Lord Abinger, C. B., at the last sittings in *Middlesex*, it appeared that a separation had taken place between defendant and his wife, and that a formal deed of separation was prepared by the attorney of the defendant and sent for perusal to the attorney of the plaintiff, who acted as the trustee of the defendant's wife. The defendant had paid 4*l.* to the plaintiff's attorney as the cost of perusing the deed. The action was brought to recover the expenses of a counterpart of the deed, and also of money advanced by the plaintiff to the defendant's wife before the first instalment under the deed of separation became due. It further appeared that the defendant had turned his wife out of doors, and had given notice to the plaintiff and his attorney not to give her credit. It having been objected that the action was not maintainable, the learned judge nonsuited the plaintiff, with liberty to move to enter a verdict for such sum as the Court should think fit.

Sir F. Pollock now moved accordingly. Admitting it to be doubtful whether, under the circumstances, the plaintiff can recover for the money lent to the wife, he is clearly entitled to recover the costs of the counterpart of the deed of separation. That deed was necessary for the wife's security, and the plaintiff, who was a trustee, was entitled to have a counterpart for the purpose of protecting her interest. When a husband went abroad, leaving his wife, and she died in his absence, it was held that a third person, who voluntarily paid the expenses of her funeral, might recover the same from the husband; *Jenkins v. Tucker* (a).

LORD ABINGER, C. B.—A counterpart of a deed of separation is not a necessary. The term necessities means that which is requisite for the sustenance or protection of the wife.

PARKE, B.—The deed of separation is not a necessary, and if so, it becomes a question whether the husband is liable on his particular contract; but here it appears from the evidence that he has disclaimed all liability.

Rule refused.

(a) 1 H. Blac. 90.

### HEMMING v. CRISP.

In an action for goods sold, the plaintiff by his particular claimed a sum for goods sold in the month of January. The evidence produced was of goods sold in the month of May, and it appeared that the defendant had dealt with the plaintiff for six months previous to that period, but all goods had been paid for up to the month of May. A verdict having been found for the plaintiff, the Court refused a rule to set aside the verdict on the ground that defendant was misled.

THIS was an action for goods sold and delivered. The plaintiff by his particular claimed the sum of 14*l.* 15*s.* 6*d.* for goods sold to the defendant on the 6th of January, 1836. At the trial before the under-sheriff of *Middlesex*, the plaintiff gave evidence of goods supplied by him on the 28th.

The evidence produced was of goods sold in the month of May, and it appeared that the defendant had dealt with the plaintiff for six months previous to that period, but all goods had been paid for up to the month of May. A verdict having been found for the plaintiff, the Court refused a rule to set aside the verdict on the ground that defendant was misled.

of *May*, and it further appeared that the defendant had been in the habit of dealing with the plaintiff for six months prior to that period, but all those goods had been paid for. The jury having found a verdict for the plaintiff for the whole amount,—

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*Humfrey* moved to set aside the verdict, on the ground that the plaintiff could not recover under his particular. The question was, whether the plaintiff had been misled; *Miltwood v. Walker* (a), *Green v. Clark* (b). Here the defendant came to meet a case of goods supplied in *January*, and he had witnesses to prove that he was not in town at that time.

**PARKE, B.**—The defendant must have known when the goods were delivered, and could not therefore have been misled by the particular.

**ALDERSON, B.**—There are frequent applications at Chambers for the plaintiff to give dates, and if the date of a particular is to be construed with such strictness it will amount to compelling a party to be nonsuited.

Rule refused.

(a) 2 Taunt. 224.

(b) 2 Dowl. P.C. 18.

### LAMBETH v. NORRIS and another.

**ASSUMPSIT** for use and occupation. At the trial before *Gurney, B.*, at the last sittings in *Middlesex*, it appeared that certain premises had been demised by indenture under seal to a person of the name of *Turner*, who had since become bankrupt, and that the defendants were his assignees. After the lease was granted to *Turner*, he was desirous of certain alterations and additions on the premises, and it was agreed between him and the lessor that the latter should lay out 250*l.* in making the required alterations and additions, and that *Turner* should pay an increased rent of 10*l.* a year. The alterations consisted of erections upon part of the ground demised, and also of work done to buildings standing at the time of the demise. The increased rent was paid by the lessee up to the time of his bankruptcy. After the bankruptcy the defendants, as assignees, took possession of the premises, but refused to pay the increased rent, for which the present action was brought. The learned judge nonsuited the plaintiff, with liberty to move to enter a verdict for him.

The lessee of premises demised under seal required the lessor to make certain alterations and additions, and in consideration thereof paid an increased rent. The lessee afterwards became bankrupt, and his assignees took possession of the premises:—*Held*, that the assignees were not liable for the increased rent.

*Channell* now moved accordingly. The agreement for the payment of the additional rent operated as a surrender and a new demise of that part of the premises on which the alterations were made. In the case of *Hoby v. Roebuck* (a), the original party to a contract like the present was held liable, and that decision is recognised in *Donellan v. Read* (b). As the defendants have taken possession of the premises they have adopted the contract, and are liable for the additional rent.

(a) 7 Taunt. 157.

(b) 3 B. & Adol. 899.

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**LORD ABINGER, C. B.**—The premises are held by a demise under seal, and there is a separate contract by which the tenant binds himself to pay an additional rent. He does not hold the premises under that contract, but under the lease. As the lease is not by parol, the only remedy is against the party to the original contract.

**PARKE, B.**—This contract does not amount to a surrender of the lease by operation of law; and a new demise of the premises at an increased rent.

Rule refused.

### CHARINGTON *v.* MEATHERINGHAM and another.

A statute provided that if an action should be brought against any person for any thing done in pursuance of that Act, and the plaintiff become nonsuit, the defendant should recover treble costs. In a case within this Act the plaintiff became nonsuit, and afterwards and before the sittings of the Court in banc the statute was repealed:—*Held*, that the Court could not award treble costs.

**THIS** was an action for irregularities committed by the defendants in levying distresses for poor-rates and highway-rate. At the trial before **Lord Abinger, C. B.**, at the Spring Assizes for *Northamptonshire*, the plaintiff was nonsuited. The master on taxation allowed the defendants treble costs under the 43 Eliz. c. 2, s. 19, and the 13 Geo. 3, c. 78, s. 82. A rule was obtained last term for the master to review his taxation, which was made absolute (a).

**N. R. Clarke** now moved to discharge that rule, and for the master to review his taxation. He stated that when the former rule was argued it was supposed the 13 Geo. 3, c. 78, had been repealed when the trial took place, but it had since been discovered that the 13 Geo. 3, c. 78, was not repealed until after the day of trial, though before the sittings of the Court in *banc*. The question then was, whether the defendants were not entitled to treble costs, as that act was in force at the time the nonsuit took place, although it was repealed before the time of signing judgment.

**Miller and Hurlstone** shewed cause.—The defendants can only recover these costs by a judgment of the Court; but at the time the Court gives its judgment, the 13 Geo. 3. c. 78 (b), is repealed by the 5 and 6 W. 4, c. 50.

(a) *Ante*, Vol. 2.

(b) 13 Geo. 3, c. 78, s. 82. And be it further enacted, That if any action or suit shall be commenced against any person or persons for any thing done or acted in pursuance of this Act, then and in every such case such action or suit shall be commenced or prosecuted within three calendar months after the fact committed, and not afterwards, and the same and every such action or suit shall be brought within the county where the fact was committed, and not elsewhere, and the defendant or defendants in every such action or suit shall and may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this present Act; and if the same shall appear to have been so done, or if any such action or

suit shall be brought after the time limited for bringing the same, or be brought or laid in any other place than as aforementioned, then the jury shall find for the defendant or defendants; or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their action after the defendant or defendants shall have appeared; or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall and may recover treble costs, and have the like remedy for recovery thereof, as any defendant or defendants hath or have in any other cases by law. 5 and 6 W. 4, c. 50, s. 109. And if a verdict shall be found for such defendant, or if the plaintiff in such action or suit shall become nonsuit, or suffer a discontinuance of such action, or if upon any demurrer in such action judgment shall be given for the defendant there-

The right to treble costs does not attach upon the nonsuit, which is a mere fact reported to the Court, who deliver their judgment accordingly. Where proceedings were taken against a debtor, under the compulsory clauses of an insolvent act, and the case standing over until the next sessions, those clauses were in the mean time repealed, on motion for a mandamus to the justices to proceed to give the debtor his discharge, the jurisdiction having attached before the clauses were repealed, the Court said that nothing was more clear than that the jurisdiction was gone, and they observed that even offences committed against the clause while in force could not have been punished without a special clause to allow it; *Miller's case* (c). Where an offence was committed against a particular act, which before the trial was repealed by another act, which substituted a different punishment, the judges were of opinion that the prisoner could not be punished under either statute; *Rex v. Mc. Kenzie* (d). The several decisions on the Bankrupt Act, 6 Geo. 4. c. 16, shew that after a statute is repealed it is the same as if it had never existed; *Surtees v. Allison* (e), *Maggs v. Hunt* (f), *Kay v. Gordon* (g). If the right to treble costs attached upon the plaintiff's non-appearance in Court, the defendants would have the same right, supposing the plaintiff had died after the nonsuit, but before signing judgment; but that is not so, *Dowbiggin v. Harrison* (h). Since the new rules the judgment must bear date the day it is signed, and there would therefore be error on the record, since it would appear that the Court had given judgment for treble costs after the 13 Geo. 3, c. 78, was repealed. [PARKER, B.—Is it necessary that the judgment should be entered upon the record for the treble costs?] It would seem from the form given in *Tidd's Appendix* that it has been the practice to do so.

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HAM  
and another.

*N. R. Clarke*, in support of the rule.—The defendants acquired a right to treble costs at the time of the nonsuit, and as the right has once attached, the Court are bound to give judgment for them. If it were not so the most serious inconvenience would follow: various statutes have been repealed, which afforded protection to persons who acted under them; and the repealing statute has only provided for any act done under it; and not for any act done under the statute repealed. The legislature, however, could never have intended that a party should be deprived of the protection which the repealed statute provided for him. It is only necessary to refer to the 3 Geo. 4, c. 126, which repealed the General Turnpike Act, and the 5 and 6 W. 4, c. 63, which repealed the 4 and 5 W. 4, c. 49, relating to weights and measures. [Lord ABINGER, C. B.—An act done may be justified by a statute in force at the time the act is done, though the other intentions of the legislature may not be carried into effect after the statute is repealed.] Suppose a party had pleaded the general issue by virtue of an Act which authorised him to do so, and to give the special matter in evidence, and that act is afterwards repealed, if the proposition contended for on the other side be correct, he would be precluded from giving the special matter in evidence. [Lord

is, then, and in any of the cases aforesaid, such defendant shall have costs, as between attorney and client, and shall have such remedy for recovering the same as any defendant may have for his or her costs in any other case by law.

(c) 1 W. Black, 451.

(d) 1 R. & R. 429.

(e) 9 B. & C. 752.

(f) 4 Bingham, 212.

(g) 6 Bingham, 582.

(h) 10 B. & C. 480.

*Exchequer.*  
**CHARINGTON**  
*v.*  
**MEATHERING-**  
**HAM**  
 and another.

**ABINGER, C. B.**—Suppose a man do an act in America which is justified by the law there, and which law gives a particular protection; if sued in this country he would be justified here, but he could not claim that protection.] The 7 Jas. 1, c. 5, which gave protection to officers acting under it, was only a temporary act, and expired at the end of seven years: at that time there was no statute of limitation, so that the protection afforded by the statute of James ceased when it expired. As to the cases under the bankrupt law, they wholly turn upon the construction of the statute. [**PARKE, B.**—Are there not some cases as to whether the costs of a nonsuit are proveable under a commission issued after the time of trial, but before signing judgment?] The cases are rather conflicting; *Thurste v. Mead* (i), *Watts v. Hart* (j), *Brough v. Hancock* (k), *Scott v. Ambrose* (l). In *Walker v. Barnes* (m), the plaintiff became bankrupt after verdict for defendant, and before judgment, and it was held that a subsequent certificate was no bar to an execution against the plaintiff after judgment, for costs of the action. And the same point was decided in the case of *Bier v. Moreau* (n).

*Cur. adv. vult.*

**Lord ABINGER, C. B.**—On a subsequent day stated, the Court were of opinion that they had no power to award treble costs. Judgment of nonsuit was in form pronounced in term, and at that time the 13 Geo. 3, c. 78, was repealed. Though a party may have protection afforded him by a statute, it does not follow that his right is to be extended to a penalty. The statutes which give costs upon a nonsuit (o) require judgment in form to be given. As these costs are in the nature of a penalty, the Court ought not to extend the construction of the act.

Rule discharged.

- (i) 5 F. R. 365.
- (j) 1 B. & P. 134.
- (k) 5 M. & P. 678.
- (l) 3 M. & S. 326.

- (m) 1 Taunt. 778.
- (n) 4 Bing. 57.
- (o) 23 H. 8, c. 154 Jac.; 1. c. 3.

### POOLE v. SUMBRIDGE.

To an action by indorsee against an acceptor of a bill of exchange, defendant pleaded that after the bill became due he was ready and willing, and tendered and offered to pay the amount of the bill and interest:—*Held* bad on demurrer.

*Seems*, that if when a bill becomes due the acceptor goes to the holder's house and cannot find him, but afterwards meets with him and tenders the money, such a plea of tender would be good.

**ASSUMPSIT** by indorsee against acceptor of a bill of exchange for 16*l.* 0*s.* 4½*d.* *Plea*, that after the making of the promise in the declaration mentioned, and after the said bill of exchange became due and payable, and before the commencement of this suit, to wit, on, &c. the defendant was ready and willing, and then tendered and offered to pay to the plaintiff the sum of 16*l.* 0*s.* 6*d.*, being the amount of the said bill, together with interest for the same, from the day when the said bill became due and payable, to the day of the tender of the said sum; to receive which of the defendant the plaintiff then wholly refused: And the defendant further saith, that he hath always, according to his said promise, from the time the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay to the plaintiff the amount of the said bill of exchange,

with interest as aforesaid; and he now brings into Court the sum of 16*l.* 0*s.* 6*d.* ready to be paid to the plaintiff, if he will accept the same.

*Demurrer and Joinder.*

*Exchequer.*

POOLE  
v.

SUMBRIDGE.

*Humfrey*, in support of the demurrer, referred to *Hume v. Peploe* (a), as an authority to shew that a tender, after the day of payment, could not be pleaded to an action against the acceptor of a bill of exchange.

*R. V. Richards*, in support of the plea. As the law at present stands the greatest inconvenience would arise if the acceptor of a bill were not permitted to plead a tender. The holder may proceed against the acceptor without making any application for payment; and if he has no mode of protecting himself by making a tender he may always be liable for costs to any holder of the bill who may wish to obtain them. [PARKE, B.—By accepting the bill he has bound himself to pay with or without notice, and it is his business to find out the holder and pay him.] In ancient times no indorsement was valid without notice to the acceptor, but since the custom of notice has been discontinued the acceptor has no means of knowing in whose hands the bill is. The question is, whether it is sufficient to plead a tender in the way it is pleaded here. *Hume v. Peploe* was decided on the authority of *Giles v. Hartis* (b); and the objection there was, that the plea only averred a readiness to pay from the time of making the tender; and Lord *Ellenborough* asks, if there was any case where an averment of *touts temps prist* was not holden to be necessary in a plea of tender. The present case is different, for here it is expressly averred, that the defendant has always, according to his said promise, from the time the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay the amount of the said bill. *Johnson v. Clay* (c), which was an action of covenant for rent, governs the present case, since there is the same liability to pay rent on the day when it becomes due as to pay a bill of exchange. In that case the Court did not entertain a doubt as to a plea of tender being good. Other authorities are collected in 1 Wms. & Saund. 33 b.

*Humfrey*, in support of the demurrer, was stopped by the Court.

LORD ABINGER, C. B.—The case of *Hume v. Peploe* is a sufficient authority against the present plea. But there is a further ground. I am not, however, prepared to say that a case might not arise in which the acceptor of a bill might successfully plead a tender. Suppose he stated, that when the bill became due, he went to the house of the holder of the bill for the purpose of paying it, and he was not at home, and that the acceptor afterwards found the holder and tendered the money, would not that be a good plea? I think the technical rules of law ought not to be abused so as to make the machinery of a court of justice the means of getting costs, though I do not know how we can relieve the defendant upon that objection. But if the acceptor of a bill goes to the holder's residence when the bill becomes due and cannot find him, but afterwards tenders him the money, it

(a) 8 East, 167.

(b) 1 Lord Raymond, 254.

(c) 7 Taunt. 486. S. C. 1. J. B. Moore, 200.

*Exchequer.*  
 POOLE  
 v.  
 SUMBRIDGE.

would be unjust to say that the acceptor is to be liable to an action, and is not to be allowed to plead that tender. The present plea, however, does not go that length. It is quite consistent with this plea that the acceptor well knew where the holder lived. Supposing, therefore, that *Hume v. Peploe* does not apply, this plea does not disclose a sufficient defence.

PARKE, B.—There seems to me no doubt that this plea is bad. The declaration states the contract, and that the defendant promised to pay the amount of the bill according to the tenor and effect thereof and of his said acceptance. This promise is admitted by the plea. By law it is clear an indorsee has a right of action against the acceptor without giving him any notice, and that when a person accepts a negotiable bill he by law obliges himself to pay it without notice. If the acceptor has put himself in a situation of hardship and difficulty by not being able to find the holder, it is his own fault, he is bound to pay on the precise day. The meaning of a plea of tender is, that the defendant has always been ready to perform his engagement, and does perform it, by tendering the amount which he is liable to pay. It is clear, from the case of *Hume v. Peploe*, that this plea is bad; it does not state that the defendant was ready upon the day when the bill became due. With respect to the case of *Johnson v. Clay*, there must be some inaccuracy in the report, or a mistake on the part of the learned judges. It seems there to have been considered necessary, in order to defeat a tender, that the plaintiff should prove a demand subsequent to the tender; that, however, is not so; and upon this principle, that the party was not ready to perform his contract at the time he is stated to be ready.

BOLLAND, B., concurred.

Judgment for the plaintiff.

BELCHER and another, Assignees of LEE and others, Bankrupts, v. JONES.

C., who had an account with L. and Co., bankers, was a Director of an Assurance Company, who also banked with L. and Co. The latter being about to stop payment, one of the partners, who had married a daughter of C., communicated to C.'s son the embarrassed state of the firm, and it was agreed that C.'s private account only should be drawn out, and C.'s son was requested not to inform any other person. One of the partners subsequently told C. that the bank must stop. In consequence of these communications the Assurance Company drew out their money. The jury having found that there was no intention to give the Assurance Company a preference, the Court refused to disturb the verdict.

ASSUMPSIT for money had and received to the use of the plaintiffs as assignees. At the trial before Lord Abinger, C. B., at the *London* sittings after last *Trinity* Term, it appeared that *Lee and Company*, the bankrupts, carried on the business of bankers in *London*, and that an account was kept with them by a person of the name of *Coope*, and also by the *Phoenix Assurance Company*, *Coope* being at that time one of the managing directors of the Company. The bank being about to stop, one of the partners, who had married a daughter of *Coope's*, communicated to his son the embarrassed state of the firm; and it was agreed that *Coope's* private account, amounting to 2000*l.*, should be drawn out. The son of *Coope* was at the same time requested not to inform *Davis*, who was a shareholder in the *Assurance Company*, or any other person. This communication took place on a *Sunday*, and on the following day *Coope's* private account was drawn out. On the

evening of that day *Lee* intimated to the elder *Coope* that the house of *Lee and Company* would stop payment on the *Wednesday* following; which event took place, the *Assurance Company* having previously drawn out their money by checks, some of which were paid over the counter, and others at the clearing-house. The learned judge left it to the jury to say, whether the communication was made with the intention of giving the *Assurance Company* any preference, and the jury found for the defendant; a rule *nisi* having been obtained, or entering a verdict for the plaintiffs.

*Eschequer.*  
*BEUCHER*  
 and another  
 v.  
*JONES.*

*Sir F. Pollock, R. V. Richards, and Martin*, shewed cause. The finding of the jury is conclusive. To constitute a fraudulent preference the act must be done with intent to contravene the bankrupt laws, and in contemplation of bankruptcy, but here the jury have found that there was no intention to give any preference whatever. The innocence or guilt of the act depends on the mind of him who did it; and it cannot be in fraud of the bankrupt laws, unless the actor meant it should be so. *Per GIBBS, C. J.*, in *Fidgeon v. Sharpe* (a). [*PARKE, B.*—The question is, if a party commit a fraud upon the bankrupt laws with one intent, and consequences follow which he did not intend, by which the creditors are injured, whether the whole money may not be recovered?] Suppose a person in embarrassed circumstances goes to consult a friend, not knowing that the latter is the holder of a bill, and the friend in consequence takes measures to secure himself; could this be considered a voluntary preference? Peculiar official information is sometimes acquired, either that a bill has been refused discount, or that a transfer of stock has taken place; and there is no doubt a party would be entitled to use this information, however acquired. The preference must be voluntary in contemplation of bankruptcy and in fraud of the statute; *Atkinson v. Potter* (b). *Gibson v. Boults* (c). *Harman v. Fisher* (d). The present case is destitute of any one of these requisites; the jury have negatived the intention to give a preference; and so far from being voluntary, the bankrupts had endeavoured to guard against it. Take the case of a party sending a letter intending to create a fraudulent preference, and by accident the letter, being misdirected, gets into the hands of a different person; could that be considered a fraudulent preference? If the doctrine is carried thus far, any communication, by chance overheard by another person, would amount to a fraudulent preference. In *Vacher v. Cox* (e), *BAYLEY, J.*, says, "The question of fraudulent preference depends on what passes in the mind of the party making the payments at the time they are made: if he acts in pursuance of a contract or engagement, or otherwise under such circumstances that he cannot have a choice, the payments are evidently not the result of preference." The doctrine of fraudulent preference is stated by Lord *Ellenborough* to be an excrescence upon the bankrupt laws; *Crosby v. Crouch* (f). And to hold this a fraudulent preference would be to extend the doctrine which has already been considered to have gone too far. *Morgan v. Brundrett* (g).

(a) 5 Taunt. 545.  
 (b) 2 Scott, 369.  
 (c) 3 Scott, 229.  
 (d) Cowp. 117.

(e) 1 B. and Adol. 152.  
 (f) 2 Camp. 168.  
 (g) 5 B. and Adol. 296.



*Exchequer.*  
**BELCHER**  
 and another  
 v.  
**JONES.**

*Sir W. Follett and Wightman*, in support of the rule. The question is, if a person on the eve of bankruptcy intends to benefit a particular creditor, and the consequence of his act is, that a greater injury is done to the creditors than he intended; whether both the act which he did, and that which he did not intend, are not equally void? This is not the case of a bankrupt making a communication to a particular creditor, who may or may not communicate it to another; but it is the case of a communication to a person who is a creditor with two rights, namely, as a partner of the firm of *Coope and Company*, and a member of the *Phoenix Assurance Company*. The case put on the other side, of a person on the eve of bankruptcy consulting his friend, is not analogous to the present, for in that instance there is clearly no intent to defraud; but if a bankrupt does an act intending to defraud his creditors, and the probable and inevitable consequence is, that the creditors are injured in a greater degree, they ought to have a remedy. Suppose *A.* and *B.* have accounts at a banker's, who communicates to both that he is about to stop payment; could it afterwards be said that he intended no benefit to *A.*, but only meant to give a preference to *B.*? So if a person has an account at a banker's, partly in his own right and partly as trustee for another, and the banker wishing to benefit the *cestui que* trust communicates to the trustee his intention to stop payment; if the trustee in consequence draw out his own account, that would be a fraudulent preference. Or if a communication is made with the intention that a creditor shall only draw out a certain sum, and he in consequence draws out his whole account, would that payment be good? So in the case of a communication made to a person who is a partner in two different firms; the bankrupt intending to benefit the one firm only, while both profit by it. Where a party intends to do a fraudulent act, he is equally responsible for all the consequences in cases of a civil as of a criminal nature. Suppose a bankrupt wishing to benefit a particular creditor, but has no other mode of communicating the intention of the bank to stop but through the means of another customer; or if, instead of telling this person to communicate the fact, the bankrupt had given him the money, and told him to take it to the other, and the consequence was that another payment was made, this latter payment would be a voluntary preference. If a customer goes with a check, and receives payment in consequence of a communication made by the bankrupt to another with intent to defeat an equal distribution, that is a fraud upon the bankrupt laws.

*Cur. adv. vult.*

**Lord ABINGER, C. B.**—After stating the fact his lordship proceeded. It appeared in evidence that it never was the intention of the bankrupt that the party to whom the communication was made should draw out the balance of the *Phoenix Assurance Company*. The jury moreover found the fact to be so. The question for our opinion was, whether, admitting the fact to be as found by the jury, yet, inasmuch as the communication was made to a director of the *Assurance Company*, and it was a probable consequence that he would act as he did in withdrawing their balance, this amounted to a fraudulent preference. In other words, the sum of the argument is, that notwithstanding a man's intention contradicting any design of a fraudulent preference, still if, from any act he does, any person whatever obtains a preference, that will amount to a fraudulent preference. We think such a con-

elusion would carry the case of fraudulent preference further than any of the cases warrant. It is admitted, that the subject of fraudulent preference was engrafted by judges, more especially by Lord *Mansfield* on the Bankrupt Law, and is since imported into the statute 6 Geo. 4, c. 16. There had been a divergence from the principle acted on by Lord *Mansfield*, but latterly there has been a recurrence to the proper principle of fraudulent preference. We think if we were to hold the circumstances of the present case to amount to a fraudulent preference, we should be stretching the cases too far. This money was paid out in the ordinary course of a banker's business, in consequence of a customer's check, and it does not appear that the other partners of the bankrupt who made the communication were at all conscious of this payment, besides the fact that this payment was made contrary to the intention of the bankrupt. It is nothing more than a payment on a banker's check, and there is no evidence here that such payment by check is a cover for fraudulent preference. Put the case of a party who, meaning a fraudulent preference to a person in the situation of *Coope*, brings money and pays him his private debt, and the party so paid had required him to pay a trust debt out of some other money which he had also with him, and that the debtor refused; if the debtor afterwards delivers the residue of the money to a third party to take for him to lodge at a banker's, and the third party (to whom he is also indebted) is advised by the person to whom the first payment is made to apply it to his own debt; if he does so, would this be a fraudulent preference by the debtor to him? I think not. And if we were to hold the present case an instance of fraudulent preference, and the assignees entitled to recover, the lengths to which it would go would be quite extravagant.

*Exchequer.*  
*BEILCHER*  
 and another  
 v.  
*JONES.*

Rule discharged.

### HILL v. ALLEN.

**A**SSUMPSIT for work and labour as an attorney and solicitor for money paid, and for money due on an account stated. The defendant pleaded first, non-assumpsit; and secondly, that the sums of money in the second and third counts mentioned were monies expended by the plaintiff and charges made by him for and in respect of the work and labour in the first count mentioned; and that in performing and bestowing the said work and labour the plaintiff, as such attorney and solicitor, conducted himself so negligently, carelessly, unskillfully, and improperly, that the same became and were wholly ineffectual and useless to the defendant; thirdly, that defendant is an illiterate person, wholly unacquainted with the legal requisites to entitle any person to strike a docket against another, or with the legal consequences of such a proceeding; and that the plaintiff, being an attorney learned in the law, and well knowing the premises on, &c. advised the defendant that by virtue of a certain promissory note then in his possession he was legally entitled to strike a docket against one *T. H.*, and requested him to strike the said docket, and to authorize the plaintiff to act as the attorney of him the defendant in that behalf, and promised him, if he would strike such docket,

To an action for work as an attorney, defendant pleaded that plaintiff conducted the business so negligently and unskillfully that defendant had no benefit from his services; and also that plaintiff undertook to do the work for nothing:—*Held* bad as amounting to the general issue.

*Exchequer.*

HILL

v.

ALLEN.

to indemnify him from all costs, damages and charges occasioned thereby, and to take care that he should incur no risk or loss in any way: that defendant, relying upon the said advice and promise of the plaintiff, did, under his advice and by and through his agency, as the attorney of the defendant in that behalf, strike the said docket: that the several sums of money in the declaration mentioned and therein supposed to be due from him to the plaintiff are costs, damages and expenses occasioned by striking the said docket. The plaintiff specially demurred to the second and last pleas, on the ground that they amounted to the general issue.

*Lumley* appeared in support of the demurrer; but

The Court called *McMahon* to support the pleas; who contended, that the second plea admitted the contract alleged in the declaration, and avoided it by shewing the plaintiff's services were useless to the defendant. The last plea shewed that the defendant had entered into the contract in consequence of a fraudulent representation made by the plaintiff, and therefore would fall within the rule of H. T. 4 W. 4, which requires such matters to be specially pleaded.

PARKE, B.—The pleas are clearly bad. The second is a denial that any service was performed by the plaintiff, for which he could claim remuneration; and the last is an agreement that the plaintiff is to receive nothing for his services (a).

Judgment for plaintiff.

(a) See *Cousins v. Paddon*, 2 C. M. & R. 547. *Jones v. Nanny*, 1 M. & W. 333.

### ATWILL v. BAKER.

An affidavit on which a rule was obtained to set aside the issue and notice of trial before the Secondary did not state that there had been a judge's order, but the rule was drawn up on reading the order:—*Held* sufficient, as the Court would judicially notice it was an order in the cause.

*HUMFREY* had obtained a rule for setting aside the issue and notice of trial for irregularity. The action was brought for a sum under 20*l.*, and a judge's order had been obtained to try the cause before the Secondary. The objection was, that the issue had been delivered in the form of an issue *ad nisi prius*, and *Ward v. Peel* (a) was cited.

*Lumley* shewed cause, and objected that it did not sufficiently appear that there was any judge's order to try the cause before the Secondary; the affidavit merely stating that the issue and notice of trial had been delivered.

*Humfrey* referred to the rule which was drawn up upon reading the judge's order, and contended that the Court would take judicial notice that it was an order in the cause.

PARKE, B.—That is sufficient. The plaintiff may amend on payment of the costs of this application.

Rule discharged accordingly.

(a) M. & W. 743. S. C. 5 Dowl. p. c. 169.

*Exchequer.*

## WHITE v. PERRERS.

**THIS** was an action of assumpsit, which had been tried before the under-sheriff of *Middlesex*, and a verdict found for the plaintiff. The defendant did not appear at the trial.

Where the date of the writ of summons was incorrectly stated in the writ of trial, the Court set aside the verdict and subsequent proceedings.

*Swann*, on a former day, obtained a rule to set aside the verdict for several alleged irregularities; the principal of which was, that the date of the writ of summons was incorrectly stated in the writ of trial, inasmuch as it was alleged to have been sued out on the 13th of *September*, but in fact issued on the 30th.

*Hindmarsh* shewed cause, and contended that the rule *nisi* obtained by the defendant only pointed at an irregularity in the verdict and subsequent proceedings, and that therefore the defendant could not take advantage of any antecedent irregularity. It was true that the date of the declaration had been inserted in the writ of trial by mistake, instead of the date of the writ of summons; but that was only an irregularity, and did not render the writ void; and unless the writ was void there was nothing irregular in the verdict or subsequent proceedings.

*Per Curiam (a)*.—This objection is fatal. The writ of trial is void, and all proceedings under it are irregular. The rule must be absolute, with costs.

Rule absolute, with costs.

(a) Lord ABINGER, C. B. PARKE, BOLLAND, and ALDERSON, BARONS.

## ROY v. BRISTOW.

**THE** first count of the declaration in substance stated, that one *E. T.* was possessed of certain shares in the *Manchester* Railway, and that a bargain took place between the defendant as the agent of the said *E. T.* and the plaintiff, for the purchase of the said shares at a certain price; that defendant then promised the plaintiff that he was authorized by the said *E. T.* to sell the said shares. Averment: that neither the said *E. T.* nor any other person authorized the defendant to sell the same: in consequence thereof plaintiff was prevented from buying other shares, and lost large sums of money. The second count alleged, that there was a contract between the defendant and the plaintiff for the sale of said shares at the same price; and in consideration thereof defendant promised plaintiff to transfer the shares to him within a reasonable time. Averment: that although plaintiff was ready and willing to receive the said shares at the said price, the defendant refused to transfer them, whereby plaintiff lost large sums of money.

A rule to strike out counts on the ground that they are substantially for the same cause of action should be drawn up on reading the declaration, or on an affidavit stating the nature of the counts.

*Cowling* moved to strike out one or other of the counts, on the ground that they were substantially for the same cause of action. *Jenkins v. Treloar (a)*

(a) 1 M. & W. 16.

*Exchequer.*  
*Roy*  
*v.*  
*Bairstow.*

*Per Curiam.*—In the first count the defendant is charged with a false representation as agent, and in the second as principal; one count is sufficient.

*Crompton* shewed cause, and objected to the form of the rule, which was not drawn up upon reading the declaration or upon affidavit that the counts were for the same cause of action.

*Per Curiam.*—The rule must be discharged with costs.

### HENDERSON and another *v.* SHERBORNE.

The defendant, an assistant overseer of the poor, being ordered by the vestry to supply a pauper with a coat out of the parish funds, furnished him with one on his own account:—*Held*, that he was not liable to a penalty of 100*l.* within the 55 G. 3, c. 137, s. 6.

*Semble.*—That such a case falls within the 4 & 5 W. 4, c. 76, s. 77.

**THIS** was an action on the 55 Geo. 3, c. 137, s. 6, tried before *LITLEDALE*, Justice, at the last Summer Assizes for the county of *Gloucester*, and was brought to recover a penalty of 100*l.* from the defendant, for an infringement of the above statute. It appeared at the trial that a pauper had applied to the vestry to be supplied with a coat, and an order was accordingly made to the overseers to furnish him with one out of the parish funds. The defendant, who was the assistant overseer, furnished him with the coat in question on his own account, and for his so doing the present action was brought.

At the trial it was contended, that the provision of the act (*a*) meant only to apply where the supply was made to the poor generally as a body, and not (as in the present instance) to an individual pauper. The learned judge was of this opinion, and nonsuited the plaintiff; giving the plaintiff leave to move this Court to set aside the nonsuit and enter a verdict for the plaintiff. *Ludlow* having obtained a rule *nisi* for a new trial last *Michaelmas* Term, cause was this day shewn by

*Talfourd*, Serjeant, and *R. V. Richards*.—The case of *Proctor v. Mainwaring* (*b*) is in point to shew that the act does not apply where the supply has been to an individual pauper, but is intended to meet the case of a general supply to the poor as a body. The words of the 6th section shew this. The New Poor Law Act, 4 & 5 Will. 4, c. 76, s. 77 (*c*), has exactly met the present case.

(*a*) The 6th section provides, "That no churchwarden or overseer of the poor, or other person or persons in whose hands the collection of the rates for the relief of the poor, or the providing for, ordering, management, control or direction of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, shall or may be placed jointly with or independent of such churchwardens and overseers or any of them, under or by virtue of any act or acts of Parliament. shall either in his own name, or in the name of any other person or persons, provide, furnish or supply, for his or their own profit, any goods, materials or provisions, for the use of any workhouse or workhouses, or otherwise, for the support and maintenance of the poor in

any parish or parishes, township or townships, hamlet or hamlets, place or places, for which he or they shall be appointed as such, during the time which he or they shall retain such appointment, nor shall he be concerned, directly or indirectly, in furnishing or supplying the same, or in any contract or contracts relating thereto, under pain of forfeiting the sum of 100*l.*, with full costs of suit, to any person who shall sue for the same by action of debt or on the case in any of his Majesty's Courts of Record at *Westminster*, &c."

(*b*) 3 B. & Ald. 145.

(*c*) "And be it further enacted, That it shall not be lawful for any person hereafter to be appointed in any parish or union to any office concerned in the administration

case of *Pope v. Backhouse* (d) will be relied upon at the other side, in addition to the fact that the case of *Proctor v. Mainwaring* is later in time: the point decided in the latter case did not arise in the former. That case is solely confined to the point, whether or not there was a profit. The 51st section (e) of the New Poor Law Act shews that the provisions of the 55 Geo. 3, as to the 100*l.* penalty, was present to the minds of the framers of it; as it expressly extends that provision to other parties to whom it was not formerly applicable, and in the 77th section recognizes the same in *Proctor v. Mainwaring*, by providing for the case of a supply to a pauper. Moreover, this statute being highly penal, the Courts will not extend its provisions.

*Eschequer.*  
*HERNIMAN*  
*and another.*  
*v.*  
*SHERBORN.*

*low, Serjeant, contra.*—Admitting this statute to be highly penal, still it is right that the legislature should prevent such conduct, this is within the chief thing they intended to remedy. The only question is, where is the difference between supplying one or any number less than the whole of the parish? The New Poor Law Act does not extend to repeal the statute 55 G. 3, which only gives a cumulative remedy, and it is still open to a party either to go to two justices to convict within the provision of the former statute, or to be sued by action for the penalty, as has been done in this case. In the case of *West v. Ambrose* (f), which was twice before the Court, a case in which it was held as to the effect of the 55 Geo. 3, in repealing *Gilbert's Act*, 3, c. 83, s. 42. The marginal note of that case is this: "A guardian of the poor, appointed under 22 Geo. 3, c. 83, is within the 55 Geo. 3, s. 6; notwithstanding the former act imposes a penalty for the breach of the provisions for the poor by such guardians." So it is plain the New Poor Law Act does not nullify the 55 Geo. 3. In *Proctor v. Mainwaring* it was a motion for a new trial, and the jury there found that there was a voluntary acceptance by the pauper in lieu of payment. But the case violates one of the best known principles of law, that a trustee for the purpose of buying and selling must not himself be the vendor. In *Stanley v. Dodd* (g), the liability of a defendant under circum-

stances for the relief of the poor, or for any person who after the twenty-fifth day of January, 1835, shall fill any such office, to supply for his own profit, or on account, any goods, materials, or be ordered to be given in parochial relief, or furnish or supply any goods, materials, or provisions for or in respect of the relief to be given in parochial relief, any person in such parish or union; any person holding such office shall, before any two justices of the peace, be subject to a penalty of five pounds for every offence, one-half of which penalty shall be paid to the informer, and the other half to the poor-rates of such parish.

Statute 239. S. C. 2 B. Moore, 186. And be it further enacted, That so soon as any act made and passed in the fifth year of the reign of his said Majesty King George the Third, intended to prevent Poor persons in parishes from embezzling certain Pro-

perty provided for their use; to alter and amend so much of an Act of the thirty-sixth year of his present Majesty as restrains Justices of the Peace from ordering Relief to Poor persons in certain cases for a longer period than one month at a time; and for other purposes therein mentioned, relating to the Poor, as inflicts a penalty on persons having the management of the poor, if concerned in providing, or in any contract for the supply, of any goods, materials or provisions for the use of any workhouse or workhouses, or otherwise for the support or maintenance of the poor for their own profit; and all remedies for the recovery of such penalties shall apply, and the same are hereby extended and made applicable to every commissioner, assistant-commissioner, guardian, treasurer, master of a workhouse, or other officer to be appointed under the provisions of this act."

(f) 1 B. & C. 77.

(g) 1 D. & R. 397.

*Eschequer.*  
**HENDERSON**  
 and another  
 v.  
**SHERBORNE.**

stances like the present is fully established. So in the case of *Barber v. Waite* (h).

The intention of the act clearly was to prevent the overseers from having a private interest against the interest of the public. How then can there be said to be a distinction in principle between a supply to one and to many? The party to buy and sell ought not to have a conflicting interest. The judgment of *Gibbs, C. J.*, in *Pope v. Backhouse*, proceeds on this principle.

**LORD ABINGER, C. B.**—I admit there is a degree of doubt in the words of the first act, and for that reason I should have been better satisfied if the Court of King's Bench had granted a rule in the case of *Proctor v. Mainwaring*. Still my doubts are not such as to induce me to say that Lord *Tenterden* was wrong. The principle that penal laws shall be strictly construed is a very sound one. There is also another good reason for not disturbing this nonsuit: if the New Poor Law Act embraces this case I cannot agree that it would not amount to a repeal of the former statute. If a crime be created by statute with one penalty, and a new penalty is given by another, I cannot say a party is liable for both. I think there is reason, in looking at the New Poor Law Act, to infer that the case which arose in *Proctor v. Mainwaring* is provided for by the annexation of a smaller penalty; and under the circumstances I think it better to adhere to that decision.

**PARKE, B.**—I think we are bound by *Proctor v. Mainwaring*. Perhaps I might not have concurred had I been present when that case was decided. However, there is considerable reason to suppose that the 77th section of the New Poor Law Act amounts to a legislative recognition of the case of *Proctor v. Mainwaring*; and the 55th section clearly evinces that the framers of the act had in their minds the penalty of 100*l.* inflicted by the 55 Geo. 3, inasmuch as they have included other parties so as to make them liable. I think we are therefore bound by the case of *Proctor v. Mainwaring*.

**BOLLAND and GURNEY, Barons**, concurred.

Rule discharged.

(h) 1 Ad. & Ell. 514. 3 Nev. & M. 611.

### CASLEY v. BINNS.

Where a plaintiff has been prevented from going to trial by the irregularity of the defendant, the Court will order an attachment to stand as a security within the 5th rule of H. T. 3 Wm. 4, although the rule to set aside the attachment might have been discussed and disposed of in sufficient time to have enabled the plaintiff to have proceeded to trial in due course.

**JERVIS** shewed cause against a rule *nisi* which had been obtained by *Humfrey* for an attachment against the sheriff of *Middlesex* for not bringing in the body. The arrest took place on the 31st *December*. The rule to return the writ was on the 5th of *January*. On the 7th, bail above was put in. Notice of exception was given on the 11th. On the 13th, notice of justification was given for the 16th, when the body rule expired. Two gentlemen were proposed for bail; but on account of the illness of one of them, the time was further enlarged till the 20th, on the condition of payment of costs. On

and disposed of in sufficient time to have enabled the plaintiff to have proceeded to trial in due course.

the 18th, a fresh notice of justification was given for the 20th. The attorney for the defendant found that Mr. *Gregory*, one of the bail, was unable to attend on account of illness, and in consequence the defendant was rendered on the 20th, and notice of render given before three o'clock on that day. On the 11th, the plaintiff declared *de bene esse*. The 27th (this day) was the last day of sittings in *London*, where the venue was laid. On the 21st, the rule *nisi* for an attachment was obtained. 1st question : Was the render in time?

*Eschequer.*  
CASLEY  
v.  
BINNS.

*Jervis* contended, first, that the object of the body rule being to compel a justification, and so give security to a plaintiff, the render was equivalent for that purpose. He admitted however that he was liable to the costs of the order of enlargement (which had not been paid) and of the present application, before the rule could be discharged on this point.

The next point was, whether the attachment was to stand as a security? As to this he argued, that the body rule enlarged the time for perfecting bail. That the declaration *de bene esse* did not come into force until bail was perfected, and that therefore the body rule not having expired till the 16th, they would have until the 20th to plead, being entitled to four days; and eight days' notice of trial would carry them over the sittings.

*Humfrey, contra*, contended that the four days for pleading began to run from the 11th, the date of the declaration *de bene esse*. The object of declaring *de bene esse* was to obtain this advantage. By the rule in all the Courts, Hil. Term, 2 Wm. 4, Rule 5, it is ordered, "That upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond on perfecting bail above, the attachment or bail-bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial; in a town cause in the term next after that in which the writ is returnable, and in a country cause at the ensuing assizes."

The question does not depend on the time when the matter comes on for discussion; the true meaning is, that if the other party by his irregularity prevents you from going to trial, at the time you would have been enabled to do so if the whole proceedings had been regular, then the attachment is to stand as a security. If we try the question by the latter branch of the rule, it is plain such is the meaning of the rule. For supposing a country cause in which bail ought to have been perfected on the last day but one of Trinity Term, and was not, and that on the last day of Term a rule had been obtained for an attachment; if application were made on the first day of the ensuing Term to set aside the attachment, could the Court say that a trial had not been lost?

*PARKE, B.*—We agree that you are right in your view of the question. It is clear the proper mode of looking at the case is, to count the time when a party would have been enabled to try if no irregularity had been committed. Applying this test, you have certainly lost a trial. This rule therefore will be discharged on payment of the costs of the order of enlargement, and of the present application, and the attachment is to stand as a security.

The rest of the Court concurring,

Rule accordingly.



*Exchequer.*

## KEY v. MAC KYNTIRE.

The first rule of T. T. 1 W. 4, does not apply to added bail.

**ADDISON** opposed the justification of bail. It appeared that the bail had been added by a judge's order. The ground of opposition was, that four days' notice had not been given pursuant to R. 1 T. T. 1 W. 4.

*Cowling*, in support of the bail, urged, that the rule relied upon did not apply to the present bail, which were country bail. He referred to *Hardbottle v. Clark (a)*, in which it was decided, that if country bail justify pursuant to the old practice, the four days' notice need not be given.

The Court, after referring to *Perry's bail (b)*, decided, that the rule of T. T. 1 W. 4 did not apply to case of added bail.

(a) 4 Dowl. p. c. 12.

(b) 1 Dowl. p. c. 564.

## ALLEN v. WALKER.

Where in a declaration on a bill of exchange against the defendant as indorser, the defendant pleaded that he did not draw the bill:—*Held*, that although such a plea would have been bad on special demurrer, still that the plaintiff was not entitled to treat it as a nullity, and sign judgment as for want of a plea.

**J. EVANS** shewed cause against a rule which had been obtained by *Richards* to set aside a judgment which had been signed for irregularity. The action was on a bill of exchange by the indorsee against the indorser, and it was stated on the face of the declaration that it was against the defendant as indorser. The defendant pleaded that he did not draw the bill as in the said declaration mentioned; whereupon the plaintiff treated the plea as a nullity and signed judgment. It was now contended on behalf of the plaintiff that inasmuch as the declaration disclosed the fact of the defendant being the indorsee, and of his being sued in that capacity, that the plea "that he did not draw" the bill, was in point of fact no plea, and therefore that the judgment was properly signed.

*Sed, per Curiam*.—Every indorser is in point of law a new drawer. No doubt the plea is defective in form, and as such would have been bad on demurrer. The proper course therefore was to have demurred, not to have treated it as a nullity.

Rule absolute.

## GARDEN v. CRESSWELL.

The affidavit upon which an attachment for not obeying a subpoena is moved for must state affirmatively that the original was shewn to the defendant at the time of his being served with a copy of such subpoena.

**I**N this case, which was a writ of inquiry before the sheriff of *Middlesex*, a witness of the name of *Barnes*, who had been subpoenaed, did not attend, and *Erle* on a former day in this Term obtained a rule *nisi* against him for an attachment for a contempt. Against this rule cause was this day shewn by *Barstow*, who took a preliminary objection to the affidavit of the service of the subpoena, for not stating that the original subpoena had been shewn to the witness at the time of the service. He relied upon the case of *Wadsworth*

*v. Marshall (a).* He also cited the case of *Rex v. Wood (b)*, to shew that this must be affirmatively stated in the affidavit; and contended that he was entitled to have the rule discharged with costs, and relied on the case of *Wilton v. Chambers (c)*.

*Exchequer.*  
GARDEN  
v.  
CRESSWELL.

LORD ABINGER, C. B.—This rule must be discharged with costs. The party who seeks to bring another into contempt must shew affirmatively that he has performed every requisite, and it is no answer that the witness did not require the original to be shewn to him.

Rule discharged with costs.

(a) 1 C. & M. 87. (b) 1 Dowl. P. C. 509. (c) 5 Nev. & Man. 431.

### TAYLOR v. MONTAGUE.

**KNOWLES** shewed cause against a rule which had been obtained by *Godson* for judgment as in case of a nonsuit. Issue had been joined in *Easter Term*, and notice of trial had been given for the last sittings in the same term. Notice was subsequently enlarged to the sittings after Term. The plaintiff had become a bankrupt since the rule *nisi* for judgment, as in case of a nonsuit had been obtained, and his assignees had refused to go on with the action. He therefore contended that this was a stronger reason than those usually deemed a sufficient excuse for not proceeding to trial.

Where a plaintiff had become bankrupt after a rule nisi for judgment, as in case of a nonsuit, and his assignees refused to go on with the action, the Court compelled him to give a peremptory undertaking and security for costs.

*Sed, per Curiam.*—He must give a peremptory undertaking to try within a month, and also security for the costs, his assignees having declined to proceed.

Rule to be absolute.

### LOVELL v. MEADOWS.

**THIS** was a rule calling on the plaintiff to give security for costs, on an affidavit that he was resident in *France*.

*Humfrey*, in answer, stated that the action was brought to recover the sum of 9l. 4s. 10d. And that the plaintiff had a letter from the defendant, admitting that 7l. was due. He also produced an affidavit, stating that the plaintiff was coming to *England* in the Spring; and contended that security was only required where a plaintiff resided permanently abroad.

It is not necessary that the residence abroad of a plaintiff should be permanent in order to entitle a defendant to call upon him for security for costs.

ALDERSON, B.—I think this a case for security.

Rule absolute.

*Exchequer.*

## BALLS v. PALMER.

Where an affidavit to enter a suggestion on the roll to give defendant his costs under the *Middlesex* County Court Act merely stated that the defendant resided in *Middlesex*, without specifying the place of his residence:—*Held*, that an affidavit in answer, stating that the defendant did not reside in *Middlesex*, was sufficient.

**ACTION** for goods sold and delivered. The plaintiff arrested the defendant for 24*l.*, and at the trial had a verdict for 1*l.* 4*s.*

On a former day *Gurney* obtained a rule *nisi* to deprive plaintiff of his costs under the 43 Geo. 3, and also to enter a suggestion on the rule to give the defendant his costs under the *Middlesex* County Court Act. As it appeared on the plaintiff's own shewing on the first point that he had no debt of an arrestable amount, the rule was made absolute on that point.

*Watson* shewed cause. The terms of the defendant's affidavit state that he was arrested in *July*, and "that he was and is still residing and inhabiting, and that the cause of action arose within, the county of *Middlesex*." He does not specify where he resided at the time; he merely swears to the words of the Act of Parliament. The plaintiff by his affidavit swears that he believes that the defendant did not reside in *Middlesex*, and that he did reside in *Surrey*, and that although the writ issued in *Middlesex*, it was not on account of knowing him to reside in *Middlesex*, but because he used to frequent a particular house within the county.

*Gurney, contra*, contended that the plaintiff's affidavit was insufficient.

ALDERSON, B.—I think if your affidavit stated a fixed place of residence, then a more general statement that you did not reside in *Middlesex* would not be sufficient; their answer, however, I think sufficient on your statement.

Rule absolute on first point.

Discharged on second.

## WILSON v. PARKER.

Where a copy of the bill of costs, and the affidavit of increase has not been delivered with the notice of taxation as required by the rule of *Michaelmas*, 1 Wm. 4, No. 10, it is irregular unless the party waive it by attendance or otherwise.

**HUMFREY** shewed cause against a rule which had been obtained by *Martin* for setting aside the taxation of the defendant's costs for irregularity. The irregularity which *Martin* relied on was that defendant, before he proceeded to tax costs, did not give to the opposite attorney a copy of the bill of costs, and of the affidavit of increase, in compliance with the 10th rule of the *Exchequer, Michaelmas*, 1 Wm. 4, which orders "That one day's previous notice of the time of taxing costs, upon rules, orders, town *postea*s, and inquisitions, and a copy of the bill of costs and affidavit to increase (if any) shall be given and delivered by the attorney or attorneys of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of the service of such a notice; and that in the cases of *postea*s and inquisitions, in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation."

*Humfrey* now contended that such a course was not usual. That when the opposite party requires a copy it is given; but if not required beforehand, it is the usual practice to deliver it when they attend to tax before the Master.

*Eschequer.*  
WILSON  
v.  
PARKER.

But, per PARKER, B.—That is only a waiver of the rule by tacit consent. If the party does not consent to waive it, how can you get over the rule which is so positive in its terms?

The rest of the Court concurring,

Rule absolute.

### GILBERT and another v. PAPE.

**M**ANSELL moved to discharge the defendant out of custody under the 48 Geo. 3, c. 123, as having lain in prison twelve months for a debt under 20*l*. The words of the act are these:—

A person living in the rules of the King's Bench, &c. is not in custody so as to entitle him to his discharge under the provisions of the 48 Geo. 3, c. 123.

“That from and after the passing of this Act all persons in execution upon any judgment, in whatsoever Court the same may have been obtained, and whether such Court be or be not a court of record, for any debt or damages not exceeding the sum of twenty pounds, exclusive of the costs recovered by such judgment, and *who shall have lain in prison thereupon*, for the space of twelve successive calendar months, shall, &c. &c.”

The defendant was not a prisoner within the walls, but had resided in the Rules.

*Bristow* shewed cause, and relied on the case of *Sumption v. Monzani* (a), as shewing that a residence within the Rules was not the custody contemplated by the act; and on the authority of that case the rule was discharged.

(a) Certified by the Master of the King's Bench.

King's Bench, } SUMPTION  
Easter Term, } v.  
1836. } MONZANI.

defendant's discharge under the 43 Geo. 3, c. 123. In full Court. Held not entitled to his discharge, not being in actual custody *within the walls*, but living within the Rules.

This was an application for the de-

*Archbold* for the plaintiff; *Petersdorff* for the defendant.

### SPYER, Assignee, v. CASPAR. Same v. HERSCHELL.

**H**OGGINS shewed cause against a rule which had been obtained by *Mansell*, for setting aside proceedings on the bail-bond, on the ground of time given to the defendant by the plaintiff without the consent of the bail. The first time was from the 29th of November to the 5th of December, and the plaintiff admitted that it was so given without the consent of the bail. Time was also given from the 5th to the 12th: this latter time was given with the consent of the bail, and *Caspar*, one of the bail, signed a consent

Where time has been given to the defendant by the plaintiff, and the bail afterwards consent to further time, with knowledge of the time already given:—*Held*, a waiver on their part of the first irregularity.

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*SPYER*  
*v.*  
*CASPAR, &c.*

to the plaintiff "for a week's further time." The question to be decided is, whether, if the bail knew of the former time, and still signed a consent for further time, that is not a waiver on their part of the former irregularity.

*Per Alderson B.*—I have inquired of the full Court, and they agree with me that if the bail knew of the first time given when they made the second application, it amounted to a waiver on their part. I think it impossible to say that by consenting to "further" time they did not know of the first time that had been given.

Rule discharged, with costs.

### POOLE'S Bail.

The two days' notice of bail by a defendant who is in custody must state that the defendant is a prisoner.

ON the bail coming up to justify, *Gurney, B.*, (sitting alone) refused to allow the justification, on the ground that the notice (a two days' notice) did not state, as was in fact the case, that the defendant was a prisoner. *Clarkson*, who appeared to support the bail, stated, that the cases on the subject were not uniform. In *Creighton's* bail (a) it was held, that it ought to appear by such notice that the defendant is a prisoner. In *Frith's* bail (b) it was held, that it was sufficient if the notice of bail given by a prisoner was signed by him as "being in custody," although it did not state in the usual form that he was a prisoner. In *Bullen's* bail (c) the same was also held.

*Busby (amicus curiæ)* mentioned a case (d) before *Littledale, J.*, where he held such a statement unnecessary, as the plaintiff must have known that the defendant was a prisoner.

GURNEY, B., desired the case to stand over until the full Court, which was accordingly done; and on being again mentioned,

PARKE, B.—The plaintiff does not of necessity know that the defendant is a prisoner. He may render without notice to the plaintiff. It is clearly irregular to omit the statement of the defendant's being a prisoner. In the case of *Frith's* bail, where the name appearing at the foot of the notice was held sufficient, the reason was, that it appeared sufficiently on the face of the notice that the defendant was a prisoner.

GURNEY, B.—There is another reason why the fact must appear with more certainty in this Court than in the King's Bench; which is, that here the allowance operates as a *supersedeas*.

(a) 1 D. P. C. 609.  
 (b) 2 D. P. C. 229.

(c) 3 D. P. C. 422.  
 (d) *Pierce's* bail, 5 D. P. C. 252.

## WESTBURY v. ABERDEIN.

Exchequer.

**A**SSUMPSIT on a policy of insurance on the *King George*, from *Malaga* to *London*. At the trial, before Lord Abinger, at *Guildhall*, at the sittings after *Trinity Term*, 1836, it appeared that the *King George* was warranted to sail on the 10th of *October*, and did so accordingly. Another vessel, called the *Fruiter*, had sailed from the same port on the 9th. The vessels having passed *Gibraltar*, were in company, on the 12th, off *Cape St. Vincent*. They then parted company, and the captain of the *Fruiter* again saw the *King George* on the 21st off *Oporto*. The vessels separated on the same day. A violent gale arose on the 25th. The *Fruiter* pursued her voyage, and arrived in *London* on the 30th. On the same day, the captain of the *Fruiter* saw the plaintiff, who was the owner of the *King George*, and communicated to him the fact of his having parted company with the *King George*, off *Oporto*, on the 21st. The policy was effected on the 3rd of *November*. The underwriters were informed of the fact of the two vessels having sailed on the respective days above mentioned; and the arrival of the *Fruiter* on the 30th was announced in *Lloyd's List*. It was not communicated to the underwriters that the vessels had been in company off *Oporto* on the 21st. The *King George* was lost in the gale of the 25th, close to the *English* coast, and the loss was known in *London* on the 4th of *November*. The premium charged was 60*s.*; and it appeared that the usual premium was 25*s.* It was also stated, that the principal risk of the voyage was before the arrival at, and in the passage through the Straits of *Gibraltar*. An objection was taken at the trial, on the ground that the fact of the two vessels having been together off *Oporto*, was material, and ought to have been communicated to the underwriters. The lord chief baron left it to the jury to say whether it was material or not, at the same time intimating an opinion that, as the dangerous part of the voyage had been passed, there was a considerable diminution of the risk. The jury returned a verdict for the plaintiff.

Two vessels, the *Fruiter* and the *King George*, sailed from *Malaga* for *London*, the former on the 9th, the latter on the 10th of *October*. A policy of insurance was effected on the *King George* on the 3rd of *November*, warranting her departure from *Malaga* on the 10th of *October*. The two vessels were together off *Oporto* on the 21st of *October*, after which they encountered a storm. The *Fruiter* arrived on the 30th of *October*. This latter circumstance was known to the underwriters; but the insurer had concealed from them that the vessels had parted company off *Oporto* on the 21st. The *King George* was lost on the 25th of *October*. In an action on the policy, the jury having found a verdict for the plaintiff, and that the fact concealed by the insurer was immaterial, a new trial was granted.

Sir *F. Pollock* obtained a rule for a new trial, in *Michaelmas Term*, on the ground of misdirection, and relied on *Kirby v. Smith* (a). Cause was now shewn by

Sir *William Follett* and *Channell*.—The plaintiff, in this case, employs a broker to effect this policy; the broker communicates to the underwriters the fact of the ship having sailed on the 10th; and they being aware of the storm that had taken place, charge an increased rate of premium, thereby clearly indicating their knowledge that she had necessarily encountered the gale. What possible necessity could there be to inform them that the vessel had been seen in her proper homeward course? Moreover, all the important facts were known to the underwriters, viz., the day of sailing, the average rate of the voyage, the storm; and, in addition, the *King George* was not a missing ship. [*Parke, B.*—Both had been exposed to the storm: one had arrived in safety.

(a) 1 B. &amp; Adol. 672.

*Eschequer.*  
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 v.  
 ABERDEIN.

Was it not a material circumstance, therefore, to communicate the fact of their being seen together immediately before the storm? By no means; because it was seen in the only place where it ought, in the natural course of things, to have been seen, viz., on the high road to *London*. Suppose even that it had been communicated to the underwriters, would it have prevented them from taking the risk? How can it increase the risk, that a vessel is seen safe before the storm? The case of *Kirby v. Smith* is altogether different from the present. In that case, "a ship had sailed from *Elsineur*, on her voyage home, six hours before the owner, who followed in another vessel on the same day; and having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship; and the Court held that these circumstances were material to be communicated to the underwriters, and that it was not sufficient to state merely that the ship insured 'was all well at *Elsineur*, on the 26th of *July*,' the day of her sailing." Now, in that case, the ship was a missing ship; and the statement, as remarked by Mr. Justice *Bailey*, in his judgment, would lead to the natural conclusion that she was left at *Elsineur* well at the time, which was contrary to the fact; so that there was not merely a concealment, but a misrepresentation; whereas, in the present case, the extra premium shews that the underwriters were aware of all the risk they incurred.

Sir *F. Pollock* and *R. V. Richards*, *contrà*.—The ground taken on the other side is altogether a fallacy. The reason for charging the extra premium was not in consequence of its being known that the *King George* had been exposed to the storm, but for the chance of the vessel being exposed to the storm. It is absurd to say that any underwriter would have taken the risk, if he had known that, of two vessels which had been together off *Oporto*, and were afterwards exposed to the storm, one had arrived four days before the policy on the other was sought to be effected. No doubt it was known at *Lloyd's*, when both vessels sailed, and also that the *Fruiter* had arrived; but the combination of facts, viz., the being together on the 21st, and the arrival of the one four days before the other, was not known. It is possible that a vessel may not be a missing ship, in reference to an entire voyage, and yet may be so in regard of information which the insurer has acquired. It would hardly be said that a ship was a missing ship, from the *East Indies*, in six months, although the voyage has been performed in five; but if seen off *Oporto* six weeks back, she would clearly be a missing ship, in reference to the voyage thence to *London*. The time of sailing is comparatively unimportant, inasmuch as the underwriters do not know the intermediate facts: a vessel may have passed nine-tenths of her voyage, and yet the remaining fraction of risk may be such as to preclude the possibility of obtaining a policy. It has been said, that the communication, if made, would have shewn that the ship had escaped the great dangers of the voyage; that is true, as regards the voyage from *Malaga* to *London*, but not so in respect to the voyage from *Oporto* to *London*. The great principle which pervades the whole law of insurance is, that every material fact, which has come to the knowledge of the insurer, he is bound to communicate to the underwriter. And besides, it is a stronger argument in favour of the materiality of the communication, that the important risk of the voyage had been passed in safety; inasmuch as something very remarkable must have occurred to retard the vessel in that portion of her voyage where

the danger is less. It cannot be doubted, that four days make an important item in the time of a voyage from *Oporto* to *London*. According to the case of *Kirby v. Smith*, if it had been a voyage from *Oporto* to *London*, there is no doubt it would have been material to have stated the day of sailing: in fact, then, that case would have been all fours with the present. The jury, no doubt, have a right to consider the materiality, or the contrary: but the case of *Bridges v. Hunter* (b) shews, that if they come to a wrong conclusion, the Court will set it right by sending the case down to another inquiry.

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ABERDEIN:

LORD ABINGER, C. B.—As it is doubtful whether the materiality of fact of the vessels having been together off *Oporto* was explained to the jury, I think the case should go to another trial, upon the terms of the underwriters paying the costs. The consideration of the storm will be then immaterial, as the only inquiry, upon the next trial, will be, whether or not the risk was increased by the circumstance of the two vessels having been together off *Oporto*, and of the *Fraser's* having arrived four days before the effecting of the policy.

PARKER, B.—I think the case ought to be submitted to another jury, and that question presented to them. In my judgment, the arrival of the one vessel so long before the other, under the circumstances of this case, is particularly important.

The other barons concurring,

Rule absolute, on payment of costs.

(b) 1 M. & Sel. 15.

### JONES v. WILLIAMS.

**TRESPASS.** The first count was for breaking and entering the plaintiff's close, in the parish of *Llandinogel*, in the county of *Caermarthen*, between a certain stream of water, called the River *Gwyddering*, and a certain farm of the defendant's, called *Dolegwynon*, and with feet in walking, and with cattle damaging, and spoiling the grass. The second count was for breaking and entering another close of the plaintiff's, called the River *Gwyddering*, and taking stones therefrom. The defendant pleaded Not Guilty; that the closes were not the closes of the plaintiff; that the stones were not the stones of the plaintiff; and leave and licence.

At the trial, before Lord DENHAM, C. J., at the last *Brecon* assizes, it appeared that the stream, called the River *Gwyddering*, which had its source far from the property of both parties, flowed between the plaintiff's farm, called *Ynnydordde*, and the defendant's farm, called *Dolegwynon*. The plaintiff claimed the whole bed of the stream at that part; while, at the same time, it was contended, on the part of the defendant, that he was entitled to a moiety. The plaintiff's farm extended, on the opposite bank, to a greater distance down the stream than the defendant's; and the plaintiff, in order to support his claim to

The plaintiff claimed the whole bed of a stream which flowed between his and the defendant's farm. The plaintiff's farm extended lower down on the one side of the stream than the defendant's, and terminated opposite another farm, called C. which adjoined the defendant's, and which was bounded by the same continuous hedge.

*Held*, that acts of ownership, exercised by the plaintiff on the bed and banks of the stream, and on the hedge at the farm C., were admissible in support of the plaintiff's claim.



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the whole bed of the stream, proposed to give, in evidence, acts of ownership exercised by him on the bank and fences of a farm called *Cefn-Cerig*, opposite to his farm, and adjoining the defendant's. The learned judge refused to receive the evidence, and the jury found a verdict for the defendant.

*Chilton*, last term, having obtained a rule to set aside the verdict, and for a new trial, on the ground the evidence was improperly rejected,

*J. Evans* and *James* shewed cause.—This is an attempt to decide the rights of these parties by evidence of acts *inter alios*. The acts done, or permitted, between the plaintiff and third parties, cannot be used against the defendant. The plaintiff may have acquired the right, as against the owner of *Cefn-Cerig*, by the laches of his neighbour; but there is no reason why the defendant should be bound by a right so acquired. If, indeed, there had been evidence that the defendant's farm and *Cefn-Cerrig* had formerly belonged to one person, who had exercised these acts of ownership, there might be some ground for admitting the evidence. This case is different from *Stanley v. White* (a); there the plaintiff proved the freehold to be his, by evidence that the trees, which he cut down, grew on *one continuous belt*. [*Park, B.*—Suppose the claim had been for a road running between two estates, and the plaintiff had claimed the whole soil in the highway, would he not have been at liberty to shew that, upon all the rest of the highway, he had exercised acts of ownership? How is this case distinguishable from *Doe v. Kemp* (b)?] There a continuity of ownership was shewn; the claim was by the lord of the manor; and the judgment of the Court turned upon the fact of the waste forming part of the same common. But here there is no evidence of such a continuity between the two places, as to create a unity of character sufficient to admit evidence of acts done on the one, to prove the right to the other. *Tyrwhitt v. Wynne* (c) shews the necessity of such proof. Here the evidence tendered amounts only to this: a hedge, and not the *media via*, is the boundary between you and me, because the boundary of your next neighbour is a hedge.

*Chilton*, in support of the rule, was stopped by the Court.

Lord ABINGER, C. B.—Taking the whole of the circumstances, in this case, together, as explained by the map, I think the evidence was admissible, though it would not be entitled to much weight unless confirmed by more cogent proof. Under the traverse, the plaintiff was to prove that he was the owner of the whole stream; and, in order to do that, he endeavoured to shew that the usual presumption of law, that each party was entitled *ad medium filum* could not arise, because he could shew the land to be continuous; and that, on the same side of the river as the land of the defendant, he had not only taken stones, but done other acts of ownership, such as repairing the hedge; and then, further, he shews that the hedge goes on without anything to intercept it, except a cross hedge dividing defendant's farm from his neighbour's, until it comes to the extremity of the plaintiff's land upon the other side. It appears to me that this evidence was admissible; but what weight is to be attached to it, is quite another question.

(a) 14 East, 332.

(b) 2 Bing. N. C. 102. S. C. 2 Scott, 9.

(c) 2 B. & Ald. 554.

**PARKER, B.**—I am also of opinion that this case ought to go for a new trial. Evidence of acts of ownership upon the contiguous hedge, and in the bed of the river adjoining the defendant's farm, are admissible, to induce the jury to draw an inference that the entire hedge and bed of the river belonged to the plaintiff. Ownership may be proved by proof of possession, and that may be done by evidence of taking the produce, and exercising other acts on the land itself; but it is impossible, from the nature of things, to confine the evidence to the precise spot in which the alleged trespass was committed: it is sufficient, if the land is so contiguous as to lead to a reasonable inference that the part in dispute also belonged to the plaintiff. If the trespass is committed in a field, you may give evidence of acts of ownership in any part of that field; for the ownership of one part causes a reasonable inference that the other belongs to the same person. There is the same rule, with regard to a wood: where there is one continuous wood not inclosed by any fence, if you prove a cutting of timber in one part, it is evidence to go to the jury of a right in the whole of it. Upon looking at the case of *Stanley v. White*, I doubt whether it does not proceed entirely upon that principle. So in the case of a continuous hedge upon one side, and a ditch on the other; though, no doubt, the defendant might rebut the presumption by shewing acts of ownership along the same fence. The value of the evidence will depend upon the frequency of the acts of ownership, and their extent. Applying that reasoning to the present case, the plaintiff, who claims the whole bed of the river, may shew, not only that he has taken stones upon the spot in question, but also all along the bed of the river. What conclusion the jury may form from the evidence, has nothing to do with the question. The principle is the same as that laid down in *Doe v. Kemp*.

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**BOLLAND and GURNEY, Bs.**, concurred.

Rule absolute.

### JONES v. JONES.

**JERVIS** had obtained a rule for the Master to review the taxation of the plaintiff's costs, on the ground that the plaintiff's attorney was not an attorney of this court during the greater part of the time when the business was done; and had not the consent, in writing, of any attorney of this court to practice in his name, pursuant to 2 Geo. 2, c. 23, s. 10. It appeared that the action was commenced in *February*, 1836, by Mr. *Gilbertson*, as the agent of Mr. *R. Williams*, who acted as the plaintiff's attorney; but Mr. *R. Williams* was not admitted an attorney of this court until the 23rd of *May* following. It was objected, that he was not entitled to the costs of the proceedings previous to his admission.

The 2 G. 2, c. 23, s. 10, does not apply to the case of a country attorney who conducts a suit through his town agent.

*R. V. Richards* shewed cause.—Mr. *Gilbertson*, whose name is on the record, is an attorney of this court, and he was employed by Mr. *R. Williams*, as his agent, to conduct the proceedings in the cause. Mr. *R. Williams* had been many years an attorney of the King's Bench. The consent of the *London*

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agent must be inferred from the facts. [*Parks*, B.—This case is precisely the same as *Goodere v. Cover* (a), where it was held to be no ground for disallowing the costs of the plaintiff's attorney, if he conducted the proceedings in the name of a *London* attorney who was an attorney of the court.]

*Jervis*, *contra*.—Here Mr. *R. Williams*'s name is indorsed on the writ; and in his affidavit of increase, he describes himself as the plaintiff's attorney. There is no consent in writing, authorizing him to use the name of Mr. *Gilbertson*. *Latham v. Hyde* (b) decided that an attorney of another court, who conducts an action in this court in his own name, cannot recover his fees. The statute makes the consent in writing a condition precedent. *Meekin v. Whalley* (c), and *Humfreys v. Hervey* (d), shew how strictly the rules as to attorneys are construed.

LORD ABINGER, C. B.—The particulars of *Latham v. Hyde* are not fully stated in the report; but there is enough to shew it is not like the present case. The statute does not require any formal licence to be given; and there appears to me sufficient evidence of the country attorney having acted with the consent of his agent. In fact, it is not Mr. *Williams*, but Mr. *Gilbertson*, who is the attorney in court. It was never intended that the statute should apply to such a case as the present. *Latham v. Hyde* only established that if an attorney of another court conducts an action in his own name in this court, he shall not recover his costs.

PARKE, B.—It appears to me that Mr. *Gilbertson* is the attorney, so far as this court is concerned. I am also of opinion that the statute does not apply to a country attorney employing an agent in town; but even supposing it did, there is sufficient evidence of a consent in writing to be collected from the correspondence.

BOLLAND and GURNEY, Bs., concurred.

Rule discharged.

(a) 3 Dow. P. C. 424.

(b) 1 C. & M. 128.

(c) 1 Bing. N. C. 59. S. C. 4 M. & Scott, 494.

(d) 1 Bing. N. C. 62. 4 M. & Scott, 500.  
2 Dow. P. C. 827.

### HOUSEGO v. COWE.

In order to prove a notice of dishonour of a bill, the plaintiff called a witness, who stated that he went to the drawer's house the day after the bill became due, and saw defendant's wife, and told her he had brought a bill which was dishonoured; she said she knew nothing about it, but would tell her husband when he came home. *Held*, sufficient notice of dishonour.

ASSUMPSIT by indorsee against drawer of a bill of exchange. *Plea*—That defendant had no notice of dishonour. At the trial, before the undersheriff of *Middlesex*, a witness proved that he called at the defendant's house the day after the bill became due, and saw there defendant's wife, and told her that he had brought a bill which was dishonoured, and shewed the bill to her; she said she knew nothing about it, but would tell her husband when he came home. No written notice was left. A verdict having been found for the

defendant's wife, and told her he had brought a bill which was dishonoured; she said she knew nothing about it, but would tell her husband when he came home. *Held*, sufficient notice of dishonour.

plaintiff, with leave to enter a nonsuit, if the Court should be of opinion that the notice was insufficient,

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*Humfrey* moved accordingly, and contended, that, even if the notice had been in writing, it would not have been sufficient. He referred to *Bolton v. Welsh* (a) and *Hartly v. Case* (b). As the defendant was not seen, a written notice ought to have been left.

*Per Curiam.*—We think the notice sufficient.

Rule refused (c).

(a) C. P. T. T. post.  
(b) 2 B. & C. 339.

(c) See *Hedger v. Stevenson*, T. T. post.

### MORGAN v. SEAWARD.

CASE, for the infringement of a patent “for certain improvements in steam-engines, and in machinery for propelling vessels; which improvements were applicable to other purposes.” The defendant pleaded, first, Not Guilty; secondly, that the specification was defective; thirdly, that the invention was not an improvement in steam-engines; fourthly, that the invention was not an improvement in machinery for propelling vessels; fifthly, that the invention was not new; and, sixthly, that part of the invention was not useful.

At the trial, before *Alderson, B.*, at the *London sittings after Trinity Term, 1836*, the following facts appeared in evidence:—*Mr. Galloway* had invented an improvement in the mode of constructing the wheels of steam-engines; and before the date of the patent, (which was on the 2nd of July, 1829,) *Curtis*, an engineer, had made two pair of wheels upon the principle mentioned in the patent, at his own factory, from instructions given him by *Galloway*, and under an injunction of secrecy, as he was about to take out a patent. The wheels were completed, and put together at *Curtis's* factory; but not shewn or exposed to the view of those who might happen to come there. After remaining a short time, the wheels were taken to pieces, packed up in cases, and shipped, in the month of April, on board a vessel in the *Thames*, and sent for the use of the *Venice and Trieste Company*, of which *Morgan* was the managing director, and which carries on its transactions abroad, but had shareholders in

G., the inventor of an improvement in the wheels of steam-engines, before he took out a patent, procured C., an engineer, to make two pair of wheels at his factory, with an injunction: as to secrecy. The wheels were completed at C.'s factory with the privacy of the plaintiff, but not shewn to those who might happen to come there; and after remaining a short time, were taken to pieces, packed up in cases, and sent abroad for the use of a company, of

which the plaintiff was a director. G. afterwards took out a patent, and assigned it to the plaintiff. *Held*, that there had been no use or publication of the invention, and that it was new at the time the patent was taken out.

*Scilicet*, that if an inventor, before he takes out a patent, constructs an article for public sale, though only fit for a foreign market, or to be used abroad, such a sale would be a use of the invention, so as to defeat a patent afterwards taken out.

In an action for infringing a patent, the declaration stated the plaintiff to be the inventor of “certain improvements in steam-engines, and in machinery for propelling vessels; which improvements were applicable to other purposes; the defendant pleaded that the invention was not an improvement in steam-engines. This issue was found for the defendant. *Held*, on motion for judgment *non obstante veredicto*, that the plea was good after verdict.

If a patent suggest that certain inventions are improvements, and one of them be not so, the patent is void, unless the objection be remedied under the 5 & 6 W. 4, c. 83.

Where the subject of a patent, taken altogether, is useful, the patent is valid, though part or parts of the machine be useless.

*Scilicet*. In order to take advantage of the defenses of want of utility in the subject of a patent, the defendant should plead the words of the statute of James I, and not that the invention was of no use.

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England. The wheels were paid for by *Morgan*, on behalf of the company; but it did not appear whether they had been sold to him by *Curtis* or *Galloway*. *Morgan* and *Galloway* employed an attorney, who entered a caveat against any other patent, on the 2nd of *March*, and afterwards solicited the patent in question, which was granted to *Galloway*, and assigned to *Morgan*.

The jury found for the plaintiff, on the first, second, and fourth issues; and for the defendant, on the third and sixth. The learned judge was of opinion that, upon the facts, the defendant was entitled to a verdict on the fifth issue, which was entered for him accordingly; with liberty for the plaintiff to move to enter a verdict in his favour on that issue, if the Court should be of opinion that the facts were such that the jury might infer there had been no use of the invention so as to destroy the novelty of the patent.

A rule having been obtained to enter judgment for the plaintiff *non obstante veredicto* upon the third and sixth issues, and to enter a verdict for the plaintiff on the fifth issue, pursuant to leave reserved, why a new trial should not be had;

The *Attorney General*, *D. Pollock*, *Alexander*, and *Jervis*, shewed cause.—First, the jury have found that the invention was not useful. Before the statute of *James*, the crown had a power to grant a patent for that which was not useful; and the crown has no such right under that statute. To support the grant, there must be *urgens necessitas* and *evidens utilitas* (a). Under the old system of pleading, it was a question for the jury, whether the invention was new and useful; and the finding it not useful, was fatal to the validity of the patent. The declaration sets forth the petition, and states “that the petitioner was the true and first inventor of certain improvements in the steam-engine, and in the machinery for propelling vessels.” If it turns out that this is no improvement, the Crown has been deceived, and the consideration for the grant fails. From the case of *Edgeberry v. Stephens*, to the present time, it has always been considered a necessary ingredient that the invention should be useful. In *The King v. Arkwright* (b), Mr. Justice *Buller* left it to the jury whether the invention was material or useful. *Eyre*, C. J., in delivering judgment, in *Boulton v. Bull* (c), says, “to make the patent good, the method must be capable of lessening the consumption of steam to such an extent as to make the invention useful.” In *Huddart v. Grimshaw* (d), Lord *Ellenborough* expresses the same opinion in his summing-up to the jury. In *Bovill v. Moore* (e), *Gibbs*, C. J., makes this observation: “In point of law, it is necessary that the plaintiff should prove this is a new and useful invention, in order to entitle himself to the present action.” The same principle is found in *Manton v. Manton* (f); *Walker v. Congreave* (g); *Hill v. Thompson* (h); *The King v. Wheeler* (i); *Bloxam v. Elsee* (k); *Lewis v. Davis* (l). If then a part of the patent is void, it is void altogether. *Hill v. Thompson* (m). The jury have found that the steam-engine is of no use; and as the consideration for granting the patent was that the petitioner had made an improvement in the steam-engine, and in the mode of propelling vessels, the whole fails.

(a) 3 Inst. 184.

(b) *Davies' Patent Cases*, 138.

(c) 2 H. Blac. 498.

(d) *Davies' Patent Cases*, 265.

(e) *Id.* 399.

(f) *Id.* 349.

(g) *Godson on Patents*.

(h) 8 Taunt. 393.

(i) 2 B. & A. 345.

(k) 1 C. & P. 558.

(l) 3 C. & P. 502.

(m) 3 Merivale, 629.

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Secondly, the invention is not new. In *Hill v. Thompson* (n), the Lord Chancellor, on a motion for a new trial, says, "In his directions to the jury, the judge has stated it as the law on the subject of patents, first, that the invention must be novel; secondly, that it must be useful; and thirdly, that the specification must be intelligible. I will go further and say, not only must the invention be novel and useful, and the specification intelligible, but also that the specification must not attempt to cover more than that which, being both matter of actual discovery and of useful discovery, is the only proper subject for the protection of a patent." In *Braxton v. Hawkes* (o), the patent was for improvements in three things distinct in their nature, and one of them not being new, the court set aside the verdict. After an invention is perfected, and before any advantage is to be derived from it, and before it is put in use, the patent must be taken out, otherwise the patentee might have a monopoly for a longer term than the fourteen years limited by the statute. It appears from the evidence that *Galloway* was the inventor, and *Morgan* the assignee of the patent, and that the latter employed *Curtis* to make the wheels according to the specification. The invention was completed in *February*, 1829; in the *April* following the wheels were shipped for *Trieste*, and it was not until the 2d of *July* that the patent was taken out. *Morgan* was the managing director of the *Venice and Trieste Steam Company*, and was in the habit of buying commodities for the use of the company, but he did not debit the company with these wheels until *October*, 1829. *Wood v. Zimmer* (p) shews the strictness with which the publication of a new invention is regarded: there *Gibbs*, C. J. says, that "to entitle a man to a patent, the invention must be new to the world. The public sale of that which is afterwards made the subject of a patent, though sold by the inventor only, makes the patent void." In *Holroyd on Patents* (q), it is said "that a manufacture will not be considered new, if it be in use or known to the public at the time of granting a patent for it. Therefore, a manufacture communicated before to the public in the shape of a specification of any other patent, or publicly sold, though by the inventor only, or taken from a book published in *England*, or communicated in any other way more or less to others, will not be considered new." That must be considered a new manufacture which is entirely new, and not that which was not sold before.

Sir *F. Pollock*, Sir *W. Follett*, and *Butt*, in support of the rule.—There was no use of the invention before the patent was granted. Whatever was done secretly, and for the purpose of bringing the machinery to perfection, cannot be considered a publication to the world. If a person who has the subject of a patent communicate it privately to a stranger, that would not be a publication. [*Alderson*, B.—It is a most important question as to what a person may do by way of experiment before he takes out a patent; the law as to that is in a confused state. In *Lewis v. Marsden* (r), the exhibition of a model to a few persons was held not to be a publication. I should have entertained considerable doubt whether that was not sufficient to put an end to the patent.] The disclosure to *Curtis* was in secrecy; the sending it abroad to be used abroad could not be considered a publication; and it is clear the wheels were never used there until after the patent was granted.

(n) 3 Merivale, 629.  
 (o) 4 B. & A. 541.  
 (p) Holt's N. P. 60.

(q) P. 18.  
 (r) 10 B. & C. 23.

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It is not absolutely necessary that the patent should be for an invention that is useful; it is sufficient if it be new, though it is for a single invention, and *a fortiori* for several improvements comprehended under the name of one invention. In *The King v. Arkwright*, the Court refused to receive evidence of the inconvenience of the invention. It must be conceded that novelty is of the very essence of the patent, but the act says nothing about utility. That is a term which admits of every possible degree: an invention may be good, or it may be innocent, or mischievous, or useless. Utility is a mere matter of opinion: a jury at *Westminster* may find the invention not useful; a jury in *London* may think it useful. Besides, it is not competent for the defendant, who is a wrong doer, to set up as a defence that the patent is useless. This may be an improvement in the construction of the steam-engine, though, by requiring a greater quantity of fuel, it may not be proper to use it. If the Crown has been deceived, it may repeal the letters patent; but there is no instance in which a party who has infringed a patent has been allowed to avail himself of a defence that the invention is not useful.

*Cur. adv. vult.*

PARKER, B.—The first question in this case is, whether the verdict for the defendant on the fifth plea ought to be set aside, and a verdict entered for the plaintiff, pursuant to the leave reserved by my brother *Alderson*. Unless this question should be disposed of in favour of the plaintiff, it would be unnecessary to consider whether the plaintiff be entitled to judgment *non obstante veredicto*, on the third and sixth pleas; for if the verdict on the fifth plea were to remain undisturbed, that would be an answer to the action.

The course which was taken with respect to this plea on the trial was to ascertain the facts, upon which the learned judge gave his opinion in favour of the defendant, but at the same time reserved liberty to the plaintiff to move to enter a verdict in his favour, if the court should be of opinion that the facts ought to have been left to the jury; that is, that they were such, that the jury might infer from them that there had been no use or publication of the invention so as to destroy the novelty of the patent. (*His lordship here stated the facts.*) Upon these facts, the question for us to decide is, whether the jury must have necessarily found for the defendant, or whether they might have found that this invention, at the date of the letters patent, was “new” in the legal sense of the word.

The words of the statute are, that grants are to be good of the sole working or making of any manner of “new manufacture to the first and true inventor or inventors of such manufactures, which others, at the time of the making such grants, did not use.” And the proviso in the patent in question, founded on the statute, is, that if the invention be not a new invention as to the public use and exercise thereof, in *England*, the patent should be void.

The word “manufacture” in the statute must be construed in one or two ways: it may mean the machine when completed, or the mode of constructing the machine.

If it mean the former, undoubtedly there has been no use of the machine, as a machine, in *England*, either by the patentee himself, or any other person, nor indeed any use of the machine in a foreign country before the date of the patent.

If the term “manufacture” be construed to be the mode of constructing

the machine, there has been no use or exercise of it, in *England*, in any sense which can be called "public." The wheels were constructed, under the direction of the inventor, by an engineer and his servants, with an injunction of secrecy on the express ground that the inventor was about to take out a patent, and that injunction was observed; and this makes the case so far the same, as if they had been constructed by the inventor's own hands, in his own private workshop; and no third person had seen it there whilst in progress. The operation was disclosed, indeed, to *Morgan*, the plaintiff, but then there is sufficient evidence that *Morgan* at that time was connected with the inventor, and designing to take a share of the patent; a disclosure of the nature of the invention to such a person, under such circumstances, must assuredly be deemed private and confidential. The only remaining circumstance is, that *Morgan* paid for the machines with the privity of *Galloway*, on behalf of the *Venice and Trieste Steam Company*, of which he was the managing director: but there was no proof that he paid more than the price of the machines, as for ordinary work of that description; and the jury would also be well warranted in finding that he did so, with the intention that the machines should be used abroad only, by the company, which, as it carried on its transactions in a foreign country, may be considered as a foreign company; and the question is, whether this solitary transaction, without any gain being to be derived thereby to the patentee or to the plaintiff, be a use or exercise in *England*, of the mode of construction, in any sense which can be deemed a use by others, or a public use, within the meaning of the statute and the patent. We think not. It must be admitted, that if the patentee himself had before his patent constructed machines for sale as an article of commerce, for gain to himself, and been in the practice of selling them publicly, that is, to any one of the public who would buy, the invention would not be new at the date of the patent. This was laid down in the case of *Wood v. Zimmer (s)*, and appears to be founded on reason; for if the inventor could sell his invention, keeping the secret to himself, and, when it was likely to be discovered by another, take out a patent, he might have practically a monopoly for a much longer term than fourteen years; nor are we prepared to say, that if such a sale was of articles that were only fit for a foreign market, or to be used abroad, it would make any difference; nor that a single instance of such a sale, as an article of commerce, to any one who chose to buy, might not be deemed a public use of the invention, so as to defeat the patent. But we do not think that the patent is vacated on the ground of the want of novelty; and the previous public use or exercise of it, by a single instance of a transaction such as this, between parties, connected as *Galloway* and the plaintiff are, (which is not like the case of a sale to any individual of the public who might wish to buy,) in which it does not appear that the patentee has sold the article, or is to derive any profit from the construction of his machine; nor that *Morgan* himself is; and in which the pecuniary payment may be referred, merely to an ordinary compensation for the labour and skill of the engineer actually employed in constructing the machine. The transaction might, upon the evidence, be no more, in effect, than that *Galloway's* own servants had made the wheels; that *Morgan* had paid them for their labour, and afterwards sent them to be used by his own co-partners

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abroad. To hold this to be what is usually called a publication of the invention in *England*, would be to defeat a patent by much slighter circumstances than have yet been permitted to have that effect. We therefore think that, as the jury might, consistently with the evidence, have found on this issue for the plaintiff, the verdict ought, pursuant to the leave reserved, to be entered on that issue for him.

The next question is, whether the plaintiff be entitled to judgment *non obstante veredicto*, or a repleader, upon the finding on the issue on the third or sixth pleas. The questions involved in the two issues are different. I propose to consider, first, that on the third plea.

The suggestion in the letters patent is, that *Galloway* had invented certain improvements in steam-engines and in machinery for propelling vessels, which improvements were applicable to other purposes; and the patent is granted for the invention of those improvements. But unless the specification be referred to, to explain the title of the patent, it is doubtful whether the invention claimed is of improvements in steam-engines, as connected with the other machinery only, or of improvements in steam-engines, to whatever purpose they may be employed. Upon reference to the specification, there is no doubt that the claim is of the latter description; but that instrument is not stated in the record; and upon what appears on the record, it is by no means clear, that the patentee does claim an improvement in steam-engines, unconnected with the machinery, and if he does not, the plea would, probably, have been bad on demurrer, as it is uncertain whether it does not deny the invention to be an improvement in steam-engines, unconnected with the machinery. But, after verdict, this objection is removed; for it is a rule, that if an issue could have been material, the Court, after verdict, ought to intend it to be so; *Kempe v. Crews* (t), and as the plaintiff did not demur, it must be taken that he admits that the plea is to be understood as denying the invention to be an improvement in steam-engines, in that sense in which it is used in the patent itself, and the jury must be intended so to have found. This brings me to the question, whether this patent, which suggests that certain inventions are improvements, is avoided, if there be one which is not so. And upon the authorities we feel obliged to hold that the patent is void, upon the ground of fraud on the Crown; without entering into the question whether the utility of each and every part of the invention is essential to a patent, where such utility is not suggested in the patent itself, as the ground of the grant. That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the common law; and such a grant is void, not against the Crown merely, but in a suit against a third person. *Travell v. Carteret* (u), *Alcock v. Cooke* (x). It is on the same principle, that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill v. Thompson* (y), *Brunten v. Hawkes* (z); for although the statute invalidates a patent for want of novelty, and consequently, by force of the statute, the patent would be void so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is that the consideration for the grant is the novelty of all, and the consideration

(t) Ld. Raym. 167.  
 (u) 3 Levinz, 135.  
 (x) 5 Bing. 340.

(y) 8 Taunt. 401.  
 (z) 4 B. & Ald. 542.

failing, or in other words, the Crown being deceived in its grant, the patent is void; and no action maintainable upon it.

We cannot help seeing, on the face of this patent, as set out in the record, that an *improvement* in steam-engines is suggested by the patentee, and is part of the consideration for the grant; and we must reluctantly hold, that the patent is void for the falsity of that suggestion.

In the case of *Lewis v. Marling(s)*, this view of the case that the patent was void for a false suggestion, does not appear by the report to have been pressed on the attention of the Court, or been considered by it. The decision went upon the grounds that the brush was not an essential part of the machine, and that want of utility in that part of the invention did not vitiate the patent; and besides, the improvement by the introduction of the brush is not recited in the patent itself, as one of the subjects of it, which may make a difference; we are, therefore, of opinion, that the defendant is entitled to our judgment on the third issue. It is a satisfaction to know that this objection will not necessarily, in the present state of the law, destroy the patent, as the objection is one which will probably be removed by the Attorney-General under the 5th & 6th W. 4, c. 83. This view of the case makes it unnecessary to consider the effect of the finding on the last issue, as amended by the judge's notes; that *part* of this invention is not useful, which is a different question from that which we have disposed of.

A grant of a monopoly for an invention which is altogether useless may well be considered as mischievous to the state, to the hurt of the trade, or generally inconvenient, within the meaning of the statute of Jac. 1, which requires, as condition of the grant, that it should not be so, for no additional improvement of such an invention could be made by any one, during the continuance of the monopoly, without obliging the person making use of it to purchase the useless invention; and, on a review of the cases, it may be doubted, whether the question of utility is any thing more than a compendious mode, introduced in comparatively modern times, of deciding the question whether the patent be void under the Statute of Monopolies; and we do not mean to intimate any doubt as to the validity of a patent for an entire machine or subject, which is, taken altogether, useful, though a part or parts may be useless, always supposing that such patent contains no false suggestion; nor do we pronounce any opinion upon the sufficiency of this plea in point of form; it may be, that the proper form of plea is to use the words of the statute, and not to plead the want of utility, though it would probably be too late to take these objections in the present stage.

The rule, therefore, to enter a verdict for the plaintiff on the 5th plea, must be absolute, and discharged as to the residue.

Rule accordingly.

(s) 10 B. & C. 22.

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## RULE OF COURT.

EXCHEQUER OF PLEAS. HILARY TERM, 7 W. 4, 1837.

It is ordered, That from and after the last day of the present term, no rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or, if made on the part of the sheriff or bail, or any officer of the sheriff, be grounded on an affidavit, shewing that such application is really and truly made on the part of the sheriff or bail or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, without collusion with the original defendant.

|             |                 |
|-------------|-----------------|
| ABINGER.    | E. H. ALDERSON. |
| J. PARKE.   | J. GURNEY.      |
| W. BOLLAND. |                 |

[This rule assimilates the practice of this court with that of the Courts of King's Bench and Common Pleas.]

END OF HILARY TERM.

# CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

Easter Term, 1837.

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HART v. ALEXANDER.

UMPSIT for money had and received to the plaintiff's use, and for money due on an account stated. Amongst other pleas which are not al, defendant pleaded that he, the defendant, in the month of May, carried on business as a partner in the firm of *Alexander and Co.*, and the causes of action accrued to the plaintiff in respect of a debt due from him; that, in the year 1822, defendant retired from the firm, and ceased to be a partner, and that one *M'Cann* became a partner in the place of the defendant; and thereupon, in consideration that the said *M'Cann* would become a partner in respect of the said debt, the plaintiff then agreed with the said firm of *Alexander and Co.*, and with the defendant, that he, the plaintiff, would discharge, and did accordingly discharge, the defendant from all liability in respect of the said debt. There were similar pleas, which only varied in stating other persons to be substituted for the defendant. The replication denied that the plaintiff agreed to discharge the defendant.

*A. & Co.* were bankers at *Calcutta*. The defendant became a partner in the firm in the year 1816, and continued a partner until the year 1822. During all this time, and for some years subsequently, the plaintiff was a creditor of the firm. The plaintiff had been for many years in *India*, but had returned to *England*,

and resided at *Hythe*, at and after the time the defendant ceased to be a partner. No formal notice was given to the plaintiff of the defendant's retirement from the partnership, but an advertisement to that effect was inserted in the gazette in *India*. During the time the defendant was a partner, and subsequently, the firm had sent to the plaintiff circular letters, stating the rate of interest they allowed on deposits. It further appeared that the defendant had inserted advertisements in two newspapers which were taken in at a reading-room to which the plaintiff subscribed, stating defendant's intention to be a candidate for an *East India* directorship. In the year 1831, the plaintiff executed a power of attorney to the house of *A. & Co.*, in which the names of all the partners were mentioned; and in the year 1833 he executed another power of attorney to a person who had become one of the partners of the firm of *A. & Co.* to prove his claim against the firm, which had failed.—*Held*, per Lord *Abinger*, C. B., *Parke* and *Alderson*, B., *Bolland*, B., *dissentiente*, that this was sufficient evidence to go to the jury that the plaintiff had knowledge of the defendant having left the firm.

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At the trial, before Lord Abinger, C. B., at the last sittings in *Middlesex*, it appeared that the action was brought to recover the balance of an account of money deposited by the plaintiff with the house of *Alexander and Co.*, who were bankers in *India*. The defendant became a partner in the firm of *Alexander and Co.*, in the year 1816, when the money was deposited, and continued to be a partner until the year 1822. At the time he retired, the firm were largely indebted to him. The capital of the firm consisted of deposits made by persons at *Calcutta*; and every year an account was rendered by the firm, signed "*Alexander and Co.*," stating what rate of interest would be allowed upon the balance in their hands. The plaintiff had received these accounts, after the defendant left the firm, until the year 1833, during which period the persons composing the firm had been several times changed. The plaintiff, who was a captain in the king's service, was sent out upon an expedition to *Java*, and remained in *India* until the year 1821, when he returned to *England*. At the time the defendant left the firm of *Alexander and Co.*, notice was given of his ceasing to be a partner in the gazette in *India*; but there was no evidence of any notice in the *English* newspapers, nor did it appear that any formal notice had been sent to the plaintiff. After his return to *England*, the plaintiff resided at *Hythe*. In the year 1823, the defendant became a candidate for an *East India* directorship, on which occasion an advertisement, addressed to the proprietors of *East India* stock, was inserted by him in the *Times* and *Courier* newspapers. It was proved that these papers were taken in at a reading-room at *Hythe* to which the plaintiff subscribed. In the year 1831, the plaintiff executed a power of attorney, enabling the firm of *Alexander and Co.* to administer the affairs of his brother, who had died in *India*. In this power of attorney the names of the partners at that time composing the firm were mentioned, and it was executed by the plaintiff at the house of *Fletcher, Alexander, and Co.*, the *London* agents. The firm of *Alexander and Co.* subsequently became bankrupts, and the plaintiff then executed a power of attorney to Mr. *Fullerton*, who had been a partner in the house after defendant left, to prove the plaintiff's claim against the firm. Upon these facts, the learned judge left it to the jury to say, whether the plaintiff had any knowledge that the defendant had ceased to be a partner. The jury having found a verdict for the defendant,

Sir *W. Follett* moved to set aside the verdict, and for a new trial, on the ground of misdirection.—There is no evidence that the plaintiff agreed to discharge the defendant, and take the credit of the new firm. The rule of law is, that, if the creditor of a firm receive *distinct notice* of the retirement of one partner and the taking in of another, and he acquiesces in the arrangement, he cannot afterwards make the retiring partner liable. The cases have only gone to this extent, that the creditor must have done some positive act to shew that he has accepted the security of the other partners. Here the most material part of the case has not been proved, since there is no evidence that the plaintiff had any notice of the retirement of the defendant from the partnership. *Thompson v. Percival* (a) is thought to have considerably shaken the authority of *David v. Ellis* (b). [*Parke, B.*—The principal point in *Thompson v. Per-*

(a) 5 B. & Adol. 925.

(b) 5 B. & C. 196.

*civil* was, whether two partners could be discharged by the substitution of one. There never was any question that you might accept A. instead of B.] There was no proof of any formal notice having been sent to the plaintiff; but, on the contrary, one of the constituents of the house of *Alexander* and Co., upon being asked whether he had received notice of the defendant having retired, answered that he had not. It was a misdirection to leave any question with respect to a notice having been sent. [Lord Abinger, C. B.—It was proved that every year the firm sent circular letters to their creditors, stating the amount of interest they meant to allow. The rate of interest was changed in several instances during the years 1822 and 1832, when the firm failed. I left it to the jury that, if they were of opinion, upon the whole evidence, that the plaintiff knew of the change in the partnership at any time before the change in the rate of interest, that would be an adoption of the firm.] It is true a notice was given in the gazette in *India*; but the plaintiff was in *England* at that time; and though it appeared that advertisements had been inserted in the *Times* and *Courier* newspapers respecting defendant's intention to stand as a candidate for a directorship, and these newspapers were taken in at a reading-room at *Hythe*, yet there was no evidence whatever that the plaintiff was at *Hythe* at that time. The powers of attorney do not prove the agreement stated in the plea.

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LORD ABINGER, C. B.—When this case was tried before me, I thought there was sufficient to go to the jury; and, upon consideration, I have a strong impression in favour of the verdict. The question is, whether the plaintiff was acquainted with the fact of the defendant having quitted the partnership in the year 1822. I thought the evidence cogent at the time of the trial, and nothing that has been urged to day has induced me to come to a different conclusion. The plaintiff was in *India* when *Java* was taken, and it does not appear that he came to *England* until the year 1821. It was proved that in the year 1822, he was living at *Hythe*, and subscribed to a reading-room there, which he constantly attended. At that time the defendant had left, and *Nathaniel Alexander*, *Fullerton*, and *M'Cann* were partners in the house. When a man invests his money in *Indian* securities, he usually takes some interest in what is passing in *India*; and I can say, from my experience in life, that a person who has been either in the military or civil service in *India*, takes great interest in matters relating to that country. It is, therefore, not at all improbable that this gentleman knew that the defendant had ceased to be a partner. Indeed, no one would doubt, that when a person, engaged in a large mercantile firm in *India*, leaves the partnership, it is generally known to all persons connected with *Indian* affairs. In the year 1823, the defendant was elected a director of the *East India Company*. Now, by the law of the land, a director of that company cannot have an interest in a mercantile house; is it then too much to suppose that that circumstance was known to an officer in the army who had invested his money in the house to which the defendant had belonged? It is not, surely, an overstrained presumption that he knew that to be the law. It further appeared, that two newspapers were taken in at *Hythe*, in which were inserted an advertisement, stating defendant's intention to be a candidate for a directorship. It also appeared that accounts were from time to time sent to the plaintiff, containing the amount of interest allowed by the firm on deposits. There was no change

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in these accounts after the year 1824. At that time they consisted of compound interest, the simple interest varying from seven and eight to as low as six per cent. In the year 1831, the plaintiff signed a power of attorney to certain persons to administer the effects of his brother, who died in *Persia*. He executed this power of attorney in the house of *Alexander* and Co. From that circumstance, it may be presumed that he was aware of the persons who formed the partnership firm, for the date was filled up in his own handwriting, and the partners in *India* were all particularly specified. If this power of attorney had been intended to be addressed to certain partners only, the natural description would have been, to "A. and B., persons in partnership or trading with others in the firm of *Alexander* and Co." Upon the face of this instrument, it must be presumed, in the absence of any thing to defeat the presumption, that the person who signed it must have been aware of who were the partners in the house of *Alexander* & Co. It further appeared that, after the firm failed, the plaintiff executed a power of attorney to *Fullerton*, who had been a partner in the house after the defendant left, to receive from the then existing firm the balance due to him. All these circumstances appear to me to be strong, very strong facts, to shew a great probability—though he could not be proved to have received the circular letters—yet that he took such an interest in the solvency, credit, and condition of his debtors, as to know who were the partners in the house. These were fair circumstances for the jury to consider, and I cannot doubt that they have come to a proper conclusion. The defendant himself left a considerable sum in the firm, and was a loser to a great extent, though that fact is not material, except to repel the imputation that he improperly left the house in difficulties. Under these circumstances, if I had said that there was no evidence to go to the jury, of the plaintiff having known the defendant left the firm, I should have stultified myself. I can see no one reason why the jury should consider that this gentleman has not attended to all his concerns, and had not the least curiosity to know if the defendant continued a partner. Sir *W. Follett*, in his able reply, put the case strongly in favour of the plaintiff; and I did not think it unbecoming my station to endeavour to remove from the jury any impression which that reply may have created. Under all the circumstances, I not only think there was evidence, but very strong evidence, to go to the jury.

PARKE, B.—I am of opinion, that no rule ought to be granted. There was evidence to go to the jury; and I do not think there was any misdirection, for I cannot call an observation of the judge upon the facts a misdirection. If his remarks are too strong, it is the province of the jury to refuse to give them any weight. The question here is, whether there is sufficient evidence to go to the jury of the plaintiff having known that the defendant ceased to be a partner in the house of *Alexander* and Co. I think there was sufficient evidence, and am by no means dissatisfied with the conclusion the jury have come to. If *Thompson v. Percival* and *David v. Ellis* had been submitted to a jury of mercantile men, it is not improbable that they might have come to a different conclusion. It was proved that the defendant ceased to be a partner in the year 1822; and the question is, whether the plaintiff had knowledge of that fact; for whether or not he had a distinct notice is immaterial, since, if he had a knowledge of the change of partnership, that would amount to an agreement to accept the new members of the firm, and to discharge the original

debtors. It appeared in evidence that the defendant had been an *East India* director; and it is by no means improbable that the plaintiff knew that fact. Two newspapers were taken in in a public room at *Hythe*, to which the plaintiff was a subscriber, in which were advertisements of the defendant's intention to stand as a candidate for the directorship. That was sufficient for the jury to presume that the plaintiff read the papers, particularly when they contained any thing relating to *India*. Then there was the fact of his having accounts from the year 1822 to the year 1833, during which time the firm was several times changed, the accounts varying the rate of interest from time to time. This was evidence to go to the jury of a knowledge of the persons rendering the account. In the year 1833, there is conclusive evidence of his knowledge of the persons composing the firm. A warrant of attorney is given to *Fullerton* to prove the plaintiff's debt against the insolvent firm in *India*. This is strong evidence of his acknowledgment of those persons as his debtors. There was sufficient to go to the jury of the plaintiff having consented to receive the new firm instead of the old. I am of opinion, that there was no misdirection and no improper conduct upon the evidence. The whole was submitted to the jury, and the verdict ought not to be disturbed. The rule of law was completely settled, that if one partner leave the firm, and a new partner come in, the debt may be transferred with the consent of all parties. *Thompson v. Percival* went further, and decided that the accepting one of two partners is sufficient.

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BOLLAND, B.—There is no doubt that if it could be shown that the plaintiff had notice of the change of partnership, the defendant would be discharged; but, in my opinion, a clear liability can only be relieved by clear and distinct proof. Looking at the whole of this evidence, I cannot find enough to satisfy me of the probability of the plaintiff having a knowledge that the defendant had left the firm. We all know that a man is not bound to look at all the newspapers which may lie in a reading-room to which he subscribes, nor, indeed, to read all that may appear in any one paper. It seems to me, therefore, too much to consider the fact of the plaintiff having subscribed to the rooms at *Hythe* as evidence of his knowledge of the change of partnership. With regard to the power of attorney, it was not necessary to mention in it the names of every person composing the firm of *Alexander* and Co. but only of such as were at that time in *India*.

ALDERSON, B.—The general rule is, that where there has been no misdirection, the Court will not grant a new trial, unless there is reason to be dissatisfied with the decision of the jury. In this case, the Chief Baron intimates that he is well pleased with the verdict. It is clear that the defendant left the firm at the time stated in the plea, and that the plaintiff trusted the firm of *Alexander* and Co., no matter who were the persons who from time to time composed the firm. The plaintiff must have been aware that there were changes in the partnership; but the material question is, whether he had knowledge of the defendant having left. I think there is not much weight to be attached to the fact of the newspaper being in the reading-room containing the advertisement alluded to. I do not see why I am to infer that the plaintiff read the advertisements; nevertheless, I cannot say, that there is not evidence to go to the jury. The plaintiff being a member of the club-room, it is



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possible that he may have read the advertisements in a newspaper. It is also reasonable that he may have looked at the power of attorney before he executed it, though I cannot say, if I had been upon the jury, I should have come to the same conclusion. I concur in refusing the rule.

Rule refused.

### RAY v. SHEWARD.

If A. wrongfully place his goods on the premises of B. the latter may justify the entry of A.'s close next adjoining, to place the goods there for his use.

THE declaration contained a count for breaking and entering the plaintiff's building, and taking his goods; and another count for breaking and entering the plaintiff's close, and depositing certain goods there. Amongst other pleas, the defendant pleaded that one R. B. was seised in his demesne as of fee, of and in the building in the declaration mentioned, and that he demised it to the defendant; and because the goods and chattels of the plaintiff, in the first count mentioned, had been wrongfully and injuriously put and placed, and were there remaining and being in the same building, encumbering the same and doing damage there, the defendant removed the same to a convenient distance, (to wit), to the close of the plaintiff, adjoining thereto, and left them there for the plaintiff's use, doing no unnecessary damage, &c. The plaintiff replied, denying the seisen of R. B. A verdict having been found for the defendant upon this issue,

*Godson* moved for judgment, *non obstante veredicto*, on this issue, and contended that the defendant was not justified in committing a trespass for the purpose of putting the plaintiff's goods upon his premises. He referred to *Houghton v. Butter (a)*.

*Cur. adv. vult.*

PARKER, B., on a subsequent day, said,—When this case was moved, I thought I recollected some authority in point, which I have since found. It is in *Viner's Abridgment*, title *Trespass*, pl. 17, (I. a.) and also in *Roll's Abrid.* title, *Trespass*, (I.) p. 17, where it is said, "If a man come into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the bar and sledge in my close, in an action of trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, (as it was pleaded,) inasmuch as they were brought into my close of his own tort, and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them, by the tort of the plaintiff." It is also stated in *Tyrringham's case (b)*, that if a man finds cattle trespassing on his land, he may chase them out, and is not bound to distrain them damage feasant.

Rule refused.

(a) 4 T. R. 364.

(b) 4 Rep. 98 b.

## NORTON v. ELLAM.

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**THIS** was an action on the following promissory note :—" I promise to pay J. N. 200*l.* on demand, with lawful interest." The defendant pleaded that the cause of action did not accrue within six years.

At the trial, before Lord Abinger, C. B. at the *Middlesex* sittings, after *Michaelmas* Term, a verdict was found for the plaintiff, with leave to enter a nonsuit, if the Court should be of opinion, that the Statute of Limitations ran from the time of the making of the note.

Where a note is payable on demand, with interest, the Statute of Limitations runs from the date of the note.

*Butt* having obtained a rule accordingly.

*Petersdorff* shewed cause.—In *Selw. N. P.* 136, it is stated, that where a promissory note is payable on demand, the statute runs from the time of the demand, and not from the date. In *Rumbold v. Ball* (a), the Court said, the bringing the action was of itself a sufficient demand; but that case was decided when the writ was a mere process for bringing the party into court, and not, as now, the commencement of the suit. The statute only begins to run from the time the cause of action accrued, by a breach of the contract; but to say it runs from the date, would advance this position—that there is a breach at the very moment of the undertaking. The stipulation for the payment of interest clearly shows, that it was the intention of the parties that some time should intervene before the defendant should be called upon for payment. In *Borough v. White* (b), *Bayley, J.* says, "It is said, that in *Banks v. Colwell, Buller, J.* treated a note, payable on demand, as a note taken by an indorsee after it was due: we are not, however, acquainted with all the circumstances of that case; payment might have been demanded before the indorsement, and, indeed, it is stated that several payments had been made on account." *Homes v. Remson* (c) decided, that a bill payable after sight does not become due until it has been presented for payment. If the time is to be calculated from the date, there could be no plea of tender. [*Parke, B.*—Yes; just as there may be a plea of tender to an action for goods sold and delivered.]

*Butt* referred to the 8th edition of *Selw. N. P.* (d), in which it is stated that a promissory note, payable on demand, is payable immediately, and the Statute of Limitations runs from the date of the note, and not from the time of demand.

**PARKE, B.**—There is no difference between this case and a claim for goods sold and delivered: the moment the goods are delivered, the money is payable; and I cannot see how the new process has made a demand necessary. Suppose the case of money lent at five per cent. interest; it is clear the plaintiff could recover both principal and interest without any demand. This is, in fact, a simple debt, payable on request; the only difference is, as to the amount, there being a compensation by way of interest. Whenever a promis-

(a) 10 Mod. 38.  
(b) 4 B. & C. 327.

(c) 2 Taunt. 323.  
(d) p. 141.

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sory note is payable on demand, an action may be brought without making any demand. It is different from the case of a promissory note payable at *sight*, because there, by the terms of the contract, it must be *shewn* to the party: it is also different from a promissory note payable *after* demand, because, in that case, there is no right of action until after a demand has been made. The stipulation for the payment of interest makes no difference, except that the debt is continually increasing *de die in diem*.

BOLLAND, B. concurred.

ALDERSON, B.—No demand is necessary, unless there is something to shew that a demand is a collateral fact.

Rule absolute.

### MILLER'S Bail.

Bail should swear they are worth the necessary sum over *what will pay* their just debts, as required by R. H. T. 2 W. 4, s. 19; but an omission to comply with the terms of that rule is no objection to the bail justifying in person, but in such case the defendant is not entitled to the costs of justification.

**RATHBONE** opposed the justification of bail, on the ground of the insufficiency of the affidavit. The bail swore they were worth property to the amount of 50*l.* "over and above all their just debts," instead of over and above *what will pay* their just debts, as required by rule H. T. 2 W. 4. s. 19.

**Mansel**, in support of the bail, contended, that the sense of the affidavit was not altered by the omission.

**PARKER, B.**—The affidavit is not sufficient; it should be in the form prescribed by the rule. This is not, however, an objection to the bail justifying, but the defendant will not be entitled to the costs of justification (a).

The bail afterwards justified.

(a) See *Hunt's bail*, 1 Har. & Wol. 530.

### BELBIN v. BUTT.

In an action of debt, payment cannot be given in evidence in reduction of damages.

**DEBT** for goods sold, and money due on an account stated. Plea, *nunquam indebitatus*. At the trial, before the under-sheriff of *Hampshire*, the plaintiff put in an admission of the sale of a carriage, called a fly, for 20*l.*, and that 3*l.* 10*s.* was paid on account. On the part of the defendant, evidence was offered of a promissory note given by him to the plaintiff, for the amount of the residue, dated the 1st *February*, 1836, payable twelve months after date, and that the note was paid after the commencement of the action. It was objected, that this evidence could not be received, there being no plea of payment. The under-sheriff received the evidence, and told the jury that the question was, whether the note was given in payment for the fly, and whether the plaintiff, by taking the note, had not deprived himself of the remedy for

enforcing payment before the expiration of the twelve months. The jury found a verdict for the defendant.

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*BUTT.*

*Addison* having obtained a rule for a new trial, unless the defendant would consent to a verdict being entered for the plaintiff, with nominal damages,

*Robinson* shewed cause, and contended, that the evidence was admissible in reduction of damages.

**PARKER, B.**—How can you give a note in evidence, in reduction of damages, in an action of debt, where there is no inquiry as to damages. It has been held that, in an action of assumpsit, payment may be given in evidence in mitigation of damages (*a*); but how can that be done in an action of debt? There must be a new trial, and the defendant may have leave to amend, on payment of the costs of the former trial before the sheriff.

Rule absolute accordingly.

(*a*) See *Shirley v. Jacobs*, 2 Bing. N. C.; 2 Scott, 157, 1 Hodges, 214.

### In the Matter of the Estate and Effects of MOSES ROBINSON, deceased.

**THE** Attorney-General moved to make absolute a rule, calling on the representatives of *Moses Robinson* to account, and that it might form part of the rule, that "if upon the delivery of the account of the testator's property, there should be found to be any duty payable to his Majesty, that the representative should pay the costs of the crown in this matter, such costs to be taxed in the usual manner." Before the passing of the 43 Geo. 3, c. 99, s. 2, there were two modes of recovering legacy duty, the one by information, at the suit of the Attorney-General, in this court; the other, by filing an information in a court of equity. Since that act, the practice had been for the comptroller of the legacy duties to send five letters to the representatives, and if they did not then render an account, an application was made to this court for a rule *nisi*. If the representatives did not appear, the rule made was, that they should, within eight days after service, deliver the account, and that they should, within the same time, pay the duty, and also the costs of the crown. Doubts had arisen as to whether the Court could award costs. Lord *Abinger*, C. B., in a recent case in *Gray's Inn Hall*, directed the question of costs to be reserved, until the executor had rendered his account. This was felt to be an inconvenience, as it became necessary to make a second application for costs, by which additional expense was incurred. This would be obviated by making, in future, a conditional order, that if it turns out that any duties are due to the crown, the representatives shall pay the costs. The 42 Geo. 3, c. 99, s. 2, was silent as to costs; but the 53 Geo. 3, c. 108, s. 3, enacts, "that in all actions, bills, plaints, informations, and proceedings, had, prosecuted, entered, or filed, or thereafter to be had, &c. in the name of his Majesty, or in the name

The Court ordered that, in future, when a rule, calling on executors to account, is made absolute, the executors not appearing, it should form part of the rule that "if, upon the delivery of an account, there should be any duties payable to the crown, that the executor should pay the costs of the crown, to be taxed in the usual manner."

*Eschequer.*  
 ~~~~~  
 In re  
 ROBINSON.

of any person in his behalf, for the recovery of any duties, debts, or penalties, granted or payable by or under any act or acts of parliament relating to the duties under the management of the commissioners of stamps, it shall be lawful for his Majesty to have and recover such duties, debts, and penalties, with full costs of suit, and all charges attending the same." Where a statute gives costs, the Court are bound to give judgment for them; *Res v. Amery (a)*. [Lord Abinger, C. B.—Suppose an executor renders an account to the commissioners, and they differ as to the legal effect of it, it would then be necessary to take further proceedings, by information, either for the duties or for the penalties, which would bring the question to be tried, and then, if found for the crown, the crown would, no doubt, be entitled to costs. *Alderson, B.*—The difficulty in my mind is, that you are asking the Court to award costs on the decision of the commissioners, and not on the decision of the Court.] It is only when the executor and the commissioners agree, that the order is final.

The Court took time to consider, and on a subsequent day,

Lord ABINGER, C. B., said,—We think there is no objection to making the rule in the form prayed for; it will save the expense of any further application.

Rule absolute.

(a) 1 Anst. 178.

### DOE dem. MORGAN v. ROE.

It is not necessary, in this court, to enter an appearance for the casual ejector, before signing judgment; nor will the costs of such entry be allowed.

A RULE having been obtained by *Erle*, for setting aside a judgment against the casual ejector, on the ground that no appearance was entered before judgment signed,

Sir *W. Follett* shewed cause.—In this court it is not necessary to enter an appearance for the casual ejector. In *Tidd's Practice (a)*, it is said, that "previously to signing judgment, common bail must be filed for the casual ejector in the King's Bench by *bill*," and two rules of that court, so far back as 1662, are referred to; but it is added, "though it does not seem necessary to enter appearance for him by original in the King's Bench or the Common Pleas." There is no such rule in this court, and in the Common Pleas it has never been the practice. The 12 Geo. 1, c. 29, which gave the plaintiff power to enter an appearance for the defendant, does not apply to ejectment, because, to bring a case within that statute, the party must be served with a copy of the process.

*Erle*, in support of the rule.—The judgment was obtained by declaration served upon the tenant in possession. According to the books of practice, an appearance must have been entered in the King's Bench, unless the proceedings were by original, and a form is given for that purpose. The practice of this court is analogous to proceedings by bill.

(a) 9th ed. p. 1224.

**PARKE, B.**—The officer certifies that it is not the practice in this court to enter an appearance, although, if it be done, it is usual to allow the costs on taxation. As there is no such practice in this court, the common sense is that in future no appearance will be required, nor will the costs of entering it be allowed. As the defendant has sworn to merits, the rule may be absolute on payment of costs.

*Exchequer.*  
  
**MORGAN**  
*v.*  
**ROE.**

Rule absolute accordingly.

### RYLAND v. WORMALD.

**COWLING** moved to set aside the judgment signed in this cause, for irregularity. The declaration was delivered on the 8th of *March*, and on the 13th, (the 12th being a *Sunday*.) the defendant pleaded his privilege as an attorney of the Court of King's Bench. The question was, whether the rule of H. T. 2 W. 4, (viii.) applied to pleas in abatement.

The rule of  
H. T. 4 W. 4,  
(viii.) applies  
to pleas in  
abatement.

*Chandless* shewed cause.—Since the rule, it has been the invariable practice to plead in abatement within the four days inclusive both of the first and last. It is stated in *Archbold's Practice* (a), that the rule does not apply to pleas in abatement. [*Parke, B.*—If you look at the grammatical construction of the rule, it is so worded as to include this case. *Alderson, B.*—This is clearly a case in which a particular number of days is prescribed by the practice of the court, and if so, the first day is inclusive, the last exclusive.] There are instances in which general words do not include cases which stand on a peculiar ground. Thus, in *Simpson v. Moss* (b), it was held, that a hawkers' license was not available in a borough, where, by a by-law pursuant to charter and custom, strangers were not permitted to trade. The courts were never disposed to favour pleas in abatement; *Jennings v. Webb* (c), *Long v. Miller* (d). The object of the new rules was to make the practice of the courts, as far as possible, uniform, and not to introduce alterations.

**PARKE, B.**—Whether or no pleas in abatement were in contemplation of the framers of the rule, we cannot tell; but the very best rule of construction is the grammatical one, without it leads to manifest absurdity.

**ALDERSON, B.**—Such a mode of construction tends to simplify the practice, but encouraging exceptions to a general rule has a tendency to create doubt and litigation. The object of the first class of rules was to make the practice uniform; then there are others for the alteration of the practice: this is not one of the first class.

Rule absolute.

(a) 3rd ed. p. 470.  
(b) 2 B. & Ald. 543.

(c) 1 T. R. 277.  
(d) 2 Str. 1192.

*Eschequer.*

## KING v. EARL DUNDONNALD.

In an action for goods sold, the defendant pleaded, as to 30*l.* parcel, &c. payment, and as to the residue, non-assumpsit. The defendant replied, that the 30*l.* in the plea mentioned was paid on account of a different cause of action. The cause was referred, and the arbitrator found for the defendant upon the plea of non-assumpsit, and for him as to 3*l.* parcel of the 30*l.*; and for the plaintiff as to the residue:—*Held*, that the damages were sufficiently assessed.

**A**SSUMPSIT for goods sold and delivered. *Plea*—as to 30*l.* parcel, &c. payment in satisfaction, and as to the residue, non-assumpsit. *Replication*—that the said sum of 30*l.* in that plea mentioned and alleged to have been paid by the defendant to the plaintiff, was paid upon another and a different account, and for another and a different cause of action than that in the declaration mentioned; without this, that the defendant paid to the plaintiff, or that the plaintiff accepted or received from the defendant, the said sum of 30*l.* in satisfaction and discharge of the cause of action in the declaration mentioned. The cause was referred to an arbitrator, who by his award found for the defendant upon the plea of non-assumpsit, and also for the defendant as to 3*l.* parcel of the 30*l.* in the plea mentioned, and as to the residue for the plaintiff.

*W. H. Watson* moved to set aside the award, and contended that the arbitrator should have gone on to assess the damages. The new assignment, coupled with the plea, did not admit the precise sum to be due.

**PARKER, B.**—The plaintiff claims a certain sum for goods: the defendant says he never was indebted to a greater amount than 30*l.*, and that he paid that sum: the plaintiff replies that the 30*l.* was paid upon another account. Upon that issue the arbitrator finds for the defendant, as to 3*l.*: that sufficiently assesses the amount of damage upon that issue to 27*l.*

**ALDERSON, B.**—The finding, in substance, is, that a verdict shall be entered for the plaintiff for 27*l.*

Rule refused.

## HEALE v. ERLE.

Where judgment was signed and execution issued in vacation, the Court permitted a suggestion to be entered to deprive the plaintiff of costs, the application having been made on the first day of the following term, and the defendant paying the costs incurred since the judgment.

**W. H. WATSON**, on the first day of term, had obtained a rule to set aside the judgment in this case, so far as related to the costs, and to enter a suggestion under the 45 Geo. 3, c. 67, (the Bath Court of Requests' Act.) The action was brought to recover 4*l.* 15*s.* for goods sold and delivered, and the defendant resided within the limits of the act. The writ of summons issued on the 17th of *January*, and an appearance was entered by the plaintiff for the defendant, according to the statute, and final judgment signed by default, on which the costs were taxed on the 25th of *February*, and on the 28th a *feri facias* issued. On applying for the rule, *Bond v. Bailey* (a), *Baddley v. Oliver* (b), and *Godson v. Lloyd* (c), were referred to.

*Crowder* shewed cause, and urged, that final judgment being signed, and execution issued, the application was too late. He cited *Heppisley v. Laing* (d).

(a) 3 Dow. P. C. 809. S. C. 2 C. M. & R. 426.

(b) 1 C. & M. 219.

(c) 4 Dow. P. C. 157.

(d) 4 B. & C. 803. S. C. 7 D. & R. 265.

*Watson*, in support of the rule, contended, that the judgment having been signed in vacation, the motion could not be made sooner. Application had been made to a judge at chambers, who had refused to interfere, the statute giving the power to the *Court* only.

*Eschequer.*

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*Per Curiam*.—The rule must be absolute, the defendant paying the costs incurred since the judgment.

Rule absolute.

### ESS v. TRUSCOTT.

**ASSUMPSIT.** The declaration alleged that it was agreed, between the defendant and the plaintiff, that the defendant would take of the plaintiff a certain dwelling-house, and would purchase the fixtures and utensils then fixed and being in the said dwelling-house, at a fair valuation, to be made by *James Crook*, of *Skinner Street, Snow Hill*, the expense of the valuation to be borne equally by the defendant and the plaintiff: it then averred that *James Crook* valued the fixtures and utensils, and that the same amounted to 3*l.* 12*s.* The defendant pleaded, first, non-assumpsit; and, secondly, that no valuation was made by *James Crook*; upon which issue was joined. At the trial, (at the *Palace Court* under a writ of trial), it appeared that the valuation had been made by one *Atkinson*, who was in the employ of *Crook*, and that the defendant was aware of that fact, and made no objection until he was told the amount of the valuation. It was objected, on the part of the defendant, that the second issue was not proved: a verdict was taken for the plaintiff, with liberty to move to enter a verdict for the defendant on that issue.

The plaintiff declared on an agreement by the defendant to purchase certain fixtures, at a valuation to be made by J. C. The defendant pleaded, that J. C. did not value the fixtures. The valuation was in fact made by A., who was in the employ of J. C., of which the defendant was aware, and made no objection until he was told the amount of the valuation. *Held*, that in order to support the issue, the plaintiff must prove an agreement that A.'s valuation should be taken as J. C.'s, and that if it was intended to substitute A. for J. C. the declaration should have been framed accordingly.

*Gaselee* having obtained a rule accordingly.

*Humfrey* shewed cause.—As the defendant did not object to *Atkinson's* valuation, it must be taken that he agreed to substitute it for *Crook's*. [*Parke*, B.—To support this issue, you must shew an agreement that *Atkinson's* valuation should be taken, the same as if *Crook* had valued. If you meant to substitute one for the other, you should have declared on the substituted agreement.] *Crook*, in effect, valued through the agency of *Atkinson*.

*LORD ABINGER*, C. B.—It is difficult to say that an act which implies some discretion, such as this case, be deputed to an agent. At all events, *Atkinson* should have shewn his valuation to *Crook*, and have let him approve of it.

*PARKE*, B.—There is no proof that defendant directed *Atkinson* to value.

Rule absolute.



*Eschequer.*

CANNAN and others, Assignees of HEALEY, a Bankrupt,  
v. Wood and another.

A delivery of goods, *bonâ fide* made in payment of a debt, is within the 82d section of the 6 Geo. 4, c. 16.

TROVER, by the assignees of a bankrupt, for the value of goods. *Pleas—*  
Not guilty; and that the goods were not the property of the plaintiffs.

At the trial before Lord Abinger, C. B. at the sittings in *London*, after last *Michaelmas* Term, it appeared that *Healey*, the bankrupt, was a dealer in fringe and lace in *London*, and that the defendants were fringe and lace manufacturers at *Manchester*. The defendants were the holders of a bill drawn by the bankrupt; and, not being able to obtain payment, commenced an action, but afterwards stayed proceedings, and accepted from the bankrupt, on the 11th and 12th of *June*, two parcels of goods in part payment of the debt, and a *cognovit* was given for the residue. The goods were not of a description required by the defendants in their trade, and would not have been taken if the money could have been obtained. The bankrupt had previously committed a secret act of bankruptcy, but no fiat issued until the 29th of *June*. The learned judge left it to the jury to say whether this payment was made in the regular course of trade, and they found it was not. A verdict was entered for the plaintiff, with liberty for the defendants to move to enter a nonsuit, if the Court should be of opinion that this was a payment protected by the 82d section of the 6 Geo. 4, c. 16.

*Erle* having obtained a rule accordingly,—

*Channell* shewed cause.—The question is, whether the delivery of goods is a payment within the 82d section of the 6 Geo. 4, c. 16. As the plaintiffs' title would have relation to the act of bankruptcy, the onus rests with the defendants to shew that they are within the protection of the 82d section. That section enacts, "that all payments really and *bonâ fide* made, or which hereafter shall be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor,) shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." Goods being, by act of law, the property of the assignees, it is incumbent on the defendants to shew that their case is taken out of the ordinary rule by virtue of that section. It is clear that every transfer of goods cannot be a payment. In order that it may so operate, the delivery must be in the ordinary course of business; but here the finding of the jury is against the defendant. In *Carter v. Breton* (a), the defendant, after a secret act of bankruptcy by P., accepted a bill for him for 98*l.* at three months, which P. paid to a creditor; in the course of the same day, P. delivered to the defendant four horses, as a security for 70*l.*, part of the 98*l.* The defendant paid the bill when it became due, and it was held that this payment was not protected. There the question had gone to the jury, who found in favour of the defendant; and the Court, in giving judgment, assumed the

(a) 6 Bing. 617.

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most favourable mode of viewing the case for the defendant. *Tindal*, C. J. says, "treating, therefore, the acceptance of the defendant, which was afterwards honoured, as an actual advance of money, which is the most favourable way of considering it for the defendant, the transaction amounts to no more than a set-off of the price of the horses against a by-gone debt; which set-off is agreed upon after a secret act of bankruptcy; and we do not think this can in any point of view be considered as a payment within the 82d section of the act. [*Alderson*, B.—In that case the horses were handed over as a security: if the delivery be such that it can only be pleaded as a set-off, it is not within the act.] In all the cases in which the courts have held transactions of this sort protected, there has been a cotemporaneous payment of money and delivery of goods. [*Parke*, B.—The question is, whether the statute requires a payment in money. The expression, "in the ordinary course of trade," is used in the 19th Geo. 2, c. 32, but is omitted in the 46 Geo. 3, c. 135; it is also admitted in the recent statute, where the words are really and *bond fide*. The finding of the jury, that this was not a payment in the ordinary course of trade, is only material so far as it might induce them to believe it was not truly and *bond fide* made.] *Warde v. Clarke* (b) decided, that if a payment was not made in the ordinary course of trade, it could not be *bond fide*; and here the fact has been left to the jury. The bankrupt had never sold the defendant any goods before, and it was only on account of the bankrupt's desperate affairs that these goods were accepted.

*Erle* and *Saunders*, in support of the rule, were stopped by the Court.

LORD ABINGER, C. B.—I was induced to reserve this point, because I thought the present act was to be interpreted in the same manner as the old acts, and I was inclined to think this payment not protected, though I gave no definite opinion at the time. The 6 Geo. 4, c. 16, differs from the 19 Geo. 2, c. 32. The former statute has omitted the words "in the ordinary course of trade," and has adopted the language of Sir *Samuel Romilly's* act, which protects a payment *bond fide* made two months before the suing out of the commission; though, after a prior act of bankruptcy, I think the 6 Geo. 4, must be construed in the same manner. Under the circumstances of this case, I am of opinion that this was a *bond fide* payment. The defendants had brought an action for the debt, and it did not appear that there was any fraud on their part; the creditor alleged that he could not raise money, because he could not get in his accounts, and got the defendants to take part of the debt in goods. It is quite clear the parties expressly agreed to take this as payment; and, if so, the debt was wiped off *pro tanto*. The question, then, is, whether what was done, was done *bond fide*: I think it was, and that the rule ought to be absolute for a nonsuit.

PARKER, B.—I also am of opinion that the rule should be absolute for entering a nonsuit. The question is reduced to this,—whether a payment in goods is a payment within the 82d section: I think it clearly is and ought to be so considered. Payment may be either in money or in money's worth, if the parties choose to consider it payment. We have the authority of Lord *Kenyon* (c)

(b) *Moo. & Malk.* 497.

(c) *Wilkins v. Casey*, 7 T. R. 711.

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that a payment in goods or bills is a payment within the 1 Jac. 1. c. 15, s. 4. Then as to whether it was really and *bond fide* made, which is requisite in order to protect it, that question does not arise upon the evidence; and if it had, my lord's attention should have been called to it, and he should have been asked to leave that question to the jury; but it appears to me there is no ground upon this evidence for saying that it was not intended to be a payment, or that it was not *bond fide* made. With respect to the question which was left to the jury, it appears to me that is a question which ought not to have been left under the present act. The words "in the ordinary course of trade" are dropped in Sir Samuel Romilly's act, and are altogether omitted in the 6 Geo. 4. The finding of the jury upon that question is an immaterial finding.

BOLLAND, B.—I am of the same opinion. There is no doubt an equivalent was given for the debt; and the question is, whether its being in goods amounted to a payment within the statute. I see no reason why a payment in goods may not be as good a payment as in money. The question, then, is, whether there is any thing to impeach the transaction from the mode in which it was carried on. Here is a pressure upon the debtor, and the creditor naturally wished to get his money as soon as possible, and agreed to take the goods in part payment, and to accept a *cognovit* for the residue. I see nothing whatever to impeach the transaction.

ALDERSON, B.—I am of opinion that this was a payment really and *bond fide* made. The true test is, whether the delivery of the goods took place under such circumstances as in point of law would amount to a payment of the debt, so that it might have been pleaded as a payment; for if it could only be pleaded as a set-off, that would not be sufficient. If that part of the debt in respect of which it was given is wiped off, that is a payment. Then as to the question of its being *bond fide*, it appears to me there is no pretence for saying that it is an unfair transaction.

PARKE, B.—It is clear no return could have been maintained for goods sold and delivered by the bankrupt.

Rule absolute.

### FIELD v. SMITH.

Where the sheriff, after notice that the defendant was about to take the benefit of the Insolvent Act, returned *seri fect*:—*Held*, that he was concluded by his return, although the defendant was afterwards discharged under the act.

HANCE had obtained a rule *nisi*, calling on the sheriff of *Shropshire*, to pay over to the plaintiff 14*l.* 0*s.* 7*d.* On the 18th of *January* a *fi. fa.* issued, under which the sheriff levied on the 27th; on the 21st of *February*, he was ordered to return the writ, and on the 1st of *March* returned that he had levied of the goods and chattels of the defendant 14*l.* 0*s.* 7*d.* On the 28th of *November* preceding, the defendant petitioned for his discharge under the Insolvent Debtors' Act, of which the sheriff received notice on the 4th of *February*; and on the 8th of *April*, the defendant was discharged under the Insolvent Debtors' Act.

W. H. Watson shewed cause.—At the time the sheriff made his return, the

defendant had only a defeasible title to the goods, which was defeated by his discharge under the Insolvent Act. In *Brydges v. Walford* (a), where the sheriff returned *feri feci*, it was held, that in an action for not paying over the money, he might nevertheless prove that the defendant became bankrupt before the judgment, and that the plaintiff knew of his insolvency at the time of the action. *Clutterbuck v. Jones* (b) is to the same effect. [Parke, B.—Here the sheriff might have ascertained by inquiry at the Insolvent Court, that the defendant had assigned his effects to the provisional assignee.] That assignment is subject to the condition of his discharge; unless the property remains in the assignee, it is only a defeasible title. [Parke, B.—The return was right when it was made; but you might have applied to the Court for relief earlier.] It would be a hardship on the sheriff, who is bound to pay the money to the assignee.

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v.  
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*Hance*, in support of the rule.—The sheriff is bound by his return. He received due notice of the assignment of the defendant's effects, and should have applied to enlarge the time for making his return. He has been guilty of negligence in not applying to the Court sooner.

PARKE, B.—If the sheriff had used due diligence, he might have discovered that the defendant had no goods at all. Before he made his return, the insolvent ceased to have any property in the goods; and it was the sheriff's own laches that he did not ascertain that fact. This case is distinguishable from those cited; for then he used due diligence, and made the only return he could. Here he had an opportunity of relieving himself, by searching the Insolvent Court; but not having done so, he must be concluded by his return.

Rule absolute.

(a) 6 M. & S. 42.

(b) 15 East, 78.

### PRITCHARD v. M'GILL.

DEBT for horse-meat, the use and hire of horses and harness, goods sold, and money due on an account stated. *Plea*—*Nunquam indebitatus*. The cause was tried before the under sheriff for *Middlesex*, and a verdict was found for the plaintiff for 1*l.* 15*s.*

*Thomas* having obtained a rule to enter a suggestion under the 23 Geo. 2, c. 33, s. 19, (the *Middlesex* County Court Act,)

*Ogle* shewed cause; and objected, that it did not appear upon the face of the affidavit that the plaintiff resided within the county of *Middlesex*. [Parke, B.—That is not necessary; it is sufficient if the cause of action arises, and the defendant resides, within the county.] The first section enables the Court to examine *viva voce*, on oath, plaintiffs as well as defendants. The fifth section authorizes the committal to gaol of parties not conforming to the

It is not necessary, in order to bring a case within the *Middlesex* County Court Act, that the plaintiff should reside within the county. The judge who tries a cause under a writ of trial, has no power to certify, under the 19th section of the 23 Geo. 2, c. 33, that the freehold or an act of bankruptcy came in question. If that

be the case, it should be shewn as cause against the order for the writ of trial.

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orders of the Court. By the 6th section, if order made for the payment of money, the county clerk may issue precept for levying the same. Without the plaintiff resided within the jurisdiction, the Court could not carry these provisions into effect. The case which decided that the defendant must reside within the jurisdiction, is but of recent date; *Tubb v. Woodward* (a). [Alderson, B.—The plaintiff is in Court when he has entered his plaint; the reason why the defendant must reside is, that if he do not, he cannot be brought into court at all: there is a distinction between a jurisdiction in *invitum*, and a jurisdiction over one who comes to ask for it.] It was decided in the case of *Webb v. Brown* (b), that the 14 Geo. 2, c. 10, did not apply to cases where the plaintiff did not reside in *London*.

Another objection is, that, under the 19th section, it ought to appear that the freehold or title to the plaintiff's land, or an act of bankruptcy, did not come in question. [Alderson, B.—There is no certificate that it did.] The under-sheriff has no power to grant one. If this is a case of that description, that should have been shewn for cause before the judge who granted the writ of trial (c).

*Thomas*, in support of the rule, was stopped by the Court.

PARKE, B.—As to the first point, I am clearly of opinion that the plaintiff is not entitled to succeed upon it. I cannot find any trace of authority for the position that the plaintiff must reside within the county to give the Court jurisdiction. All the books say is, that the cause of action must arise, and the defendant must reside, within the county. At common law this was a matter which could be tried in the county court. The act of parliament does not impose the necessity of the plaintiff's residing within the county; but merely gives the Court a power of examining the parties, although that power is to be enforced by a process which does not extend beyond the limits of the county; but that does not make it necessary that the plaintiff should reside there. This view is confirmed by the 19th section, which only requires the defendant to reside within the county, but says nothing about the plaintiff. With regard to the other objection, *Wills v. Langridge*, which was decided by Mr. Justice *Littledale* in the Bail Court, is expressly in point.

ALDERSON, B.—It is impossible to read the 19th section, without perceiving that the only person who is required to reside within the county, is the defendant. In the present case, the defendant resided within the county, and was liable to be summoned.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

(a) 6 T. R. 175.  
 (b) 5 T. R. 535.

(c) *Jones v. Barnes*, ante.

## EDWIN WILSON v. BARTHORPE.

*Exchequer.*

**A**SSUMPSIT by indorsee against defendant, as drawer of a bill of exchange. *Plea*, that defendant did not draw the bill.

At the trial, before Lord *Abinger*, C. B., at the *Middlesex* sittings after *Michaelmas* Term, the bill given in evidence was as follows :

“ *Wakefield*, July 30, 1836.

“ Two months after date, pay to our order 300*l.* for value received in wool.

“ *J. Barthorpe* and Son.”

“ To Mr. *Harrison*.”

The bill was accepted by *Harrison*, and indorsed “ *J. Barthorpe* and Son.” It appeared that the firm of *Barthorpe* and Son had consisted of *Jonathan Barthorpe*, his son, and *H. Halliday*, a son-in-law of the elder *Barthorpe*. In the year 1835, *Barthorpe*, the son, died, and, two months afterwards, his father also died. The defendant, who had been a clerk in the firm, after the death of the two *Barthorpes*, was employed by *Halliday* to wind up the affairs of the partnership, and, during that time, he drew the bill in question, and indorsed it to the plaintiff, who discounted it. The defendant also carried on business on his own account. The learned judge was of opinion, that the defendant was not liable on the bill, and nonsuited the plaintiff.

The defendant, a clerk in the firm of B. and Co., after the death of two of the partners, being employed by the survivor to wind up the partnership affairs, drew and indorsed a bill of exchange, in the name of the firm : *Held*, that he was not liable on the bill, without some evidence that he had used the name of his principal without authority.

*Hoggins* having obtained a rule, in *Hilary* Term, to set aside the nonsuit,

*Knowles* shewed cause.—The defendant is not personally liable on the bill. In *Leadbitter v. Farrow* (a), which is most in favour of the other side, the agent of a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon *London*, drew in his own name for the amount upon the firm in *London*, and it was held he was liable ; Lord *Ellenborough*, in giving judgment, observing, that it was a universal rule, that a man who puts his name to a bill of exchange, makes himself personally liable, unless he states, upon the face of the bill, that he subscribes it for another. In the present case, the defendant has drawn and indorsed the bill in the name of the firm, and the plaintiff must have taken it upon the credit of the house of *Barthorpe* and son. If the defendant had no authority to draw the bill, it would be a forgery, or he might be liable for a false representation. [Lord *Abinger*, C. B.—No person can be liable as the drawer of a bill, whose name does not appear upon the bill, or the name of the firm under which he is in the habit of trading.] In *Polhill v. Walter* (b), the defendant, without authority, wrote on the bill an acceptance, as by procuration of the drawee, believing that the acceptance would be sanctioned, and it was held he could not be charged as the acceptor of the bill. Lord *Tenterden*, in giving judgment, distinguishes the case from that of a pretended agent making a promissory note, or purchasing goods in the name of a supposed principal. Here the defendant was

(a) 5 M. & S. 345.

(b) 3 B. & Adol. 114.

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employed to conduct the business of *Barthorpe* and Co.; and, *prima facie*, had an authority to draw the bill.

*Hoggins*, in support of the rule.—It should have been left to the jury to say, whether, under the circumstances, the defendant drew and indorsed the bill upon his own account. In *Polhill v. Walter*, Sir J. Scarlett, for the plaintiff, says, "If a person assumes to act as the agent of another, and, in fact, has no authority, any contract which he may have made, may be treated as made by him personally." [Lord Abinger, C. B.—Suppose the defendant applied the money to his own use, upon shewing that he had no authority to draw the bill, you might maintain an action for money had and received.] *Polhill v. Walter* is not applicable to the present case; there the defendant was induced to accept the bill, by an assurance by the payee that it was perfectly regular, and believing that the acceptance would be sanctioned. In *Thomas v. Hewes* (c), which was an action of trespass against B., the land-agent of C., the party really interested, H., who acted as the defendant's attorney, upon the employment of C., consented to an order of *nisi prius*, upon certain terms, and on motion to set aside the order, on the ground that H. had no authority to bind C. by any such arrangement, the Court refused to interfere. [Parke, B.—Is there any distinction between the case of a bill of exchange and a contract for goods sold, signed in the name of a firm?] *Vere v. Lewis* (d), *Tatlock v. Harris* (e), are to the effect, that a bill drawn, payable to the order of a fictitious person, may be treated as payable to the bearer's order. [Lord Abinger, C. B.—All those cases turn upon the fact of the bills having been drawn by a known house, in behalf of a fictitious payee.]

*Cur. adv. vult.*

Lord ABINGER, C. B., delivered the judgment of the court. After stating the facts, his lordship proceeded:—A motion was made to set aside the non-suit, and enter a verdict for the plaintiffs, on the ground that the defendant was liable, inasmuch as he drew the bill, having no authority from the firm of *Barthorpe* and Co. Without considering whether a party can, under any circumstances, be liable, who is not the drawer or acceptor of a bill, we are of opinion, that before any man can be charged with a transaction of this sort, some, or at least *prima facie* evidence, should be given, that he used the name of a firm without authority. It is no uncommon thing, among commercial men, to allow a clerk to draw bills; and it can never be contended, that the clerk is to be liable as the drawer of the bills. There should be some evidence, at least, that the clerk had used the name of his principal without authority. In the present case, the evidence of that fact not only failed, but was rather the other way; as the defendant was the confidential clerk of the firm, and employed solely to carry on the business of the house, either by drawing bills as he had been in the habit of doing, or by such other means as were necessary.

Rule discharged.

(c) 2 C. & M. 519.

(d) 3 T. R. 182.

(e) 3 T. R. 174.

## HALL v. PIERCE.

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**ARCHBOLD** moved for a rule nisi, to allow the plaintiff the costs of an action on a judgment. The original action was on a promissory note, and the defendant, who had been surrendered by his bail, was superseded by reason of not being charged in execution in due time. The defendant, after obtaining time to plead to the action on the judgment, pleaded *nil tiel record*. **Archbold** urged that, as the defendant had caused delay, and had pleaded a false plea, it was a case for the Court to exercise the discretion given by the 43 Geo. 3, c. 46, s. 4. He referred to *Gernwell v. Barker* (a), where a defendant sued out a writ of error, and, to an action on the judgment, pleaded *nil tiel record*, and the Court gave the plaintiff his costs.

The defendant was superseded for not being charged in execution in due time, and the plaintiff having brought an action on the judgment, the defendant obtained time, and then pleaded a false plea; the Court refused to allow the plaintiff costs, the 43 Geo. 3, c. 46, s. 4, giving no power to separate them.

**PARKE, B.**—You seek to rectify the blunder in not charging the defendant in execution in due time. The question then is, whether the defendant or the plaintiff ought to suffer? I think, the plaintiff. If, indeed, the costs could be separated, it is clear the defendant ought to pay the costs of his false plea; but the act of parliament gives no such power.

Rule refused.

(a) 5 Taunt. 264.

## WATSON v. DORE.

**GODSON** moved to set aside a judgment for irregularity. The defendant had given a cognovit for debt and costs, and the objection was, that no appearance had been entered until three days after judgment was signed.

Judgment signed upon a cognovit before appearance entered, is irregular.

**Petersdorff** shewed cause, upon an affidavit that the appearance was entered *nunc pro tunc*.—In *Davis v. Hughes* (a), judgment was signed without filing common bail for the defendant, until after the succeeding term after the writ was returnable, and it was held, that the defendant, having given a cognovit, was estopped from objecting to the irregularity, common bail having been filed *nunc pro tunc*. [**Parke, B.**—At that time there was relation to the first day of term; but now, every judgment must bear date upon the precise day when signed, and there can be no relation of appearances.] The cognovit authorizes the plaintiff's attorney, or any other attorney of the court, to appear for the defendant, if necessary. Under this authority, the plaintiff's attorney is the attorney for the defendant, and it is not competent for the latter to repudiate the act of his own agent.

**PARKE, B.**—Judgment should not have been signed until after the defendant was in court. The irregularity is in signing judgment before appearance.

Rule absolute, with costs.

(a) 7 T. R. 206.



*Exchequer.*

## LILLEY v. JOHNSON.

On shewing cause against a rule for a new trial, before the sheriff, affidavits are admissible, containing a statement of evidence which does not appear on the sheriff's notes.

THIS was a writ of trial before the under-sheriff of *Yorkshire*.

*Cottingham* having obtained a rule for a new trial, on the ground that the verdict was against evidence,

*G. T. White* shewed cause, upon affidavits containing statements of facts proved at the trial, but which did not appear upon the under-sheriff's notes.

*Cottingham* admitted, that if the affidavits could be received, he could not support his rule.

The Court held the affidavits admissible, and discharged the rule.

## SAMUEL BOYDELL v. CHAMPNEYS.


If an insolvent debtor inserts in his schedule the holder of a negotiable security, he is discharged as to all parties, though not named, and also as to the debt for which it was a security.

ASSUMPSIT by drawer against acceptor of a bill of exchange, with a count for work and labour as an attorney. *Plea*—That defendant was discharged under the Insolvent Debtors' Act. At the trial, before *Alderson, B.*, at the *London* sittings in *Hilary* Term, it appeared that the defendant was indebted to the plaintiff for business done as an attorney, and that the bill in question was accepted in payment of that debt, and was indorsed by the plaintiff to *Charles Boyde*ll. The bill being dishonoured, *Charles Boyde*ll sued the defendant, and obtained judgment, but did not take him in execution. The defendant shortly afterwards took the benefit of the Insolvent Debtors' Act, having inserted *Charles Boyde*ll, but not the plaintiff, in his schedule. After his discharge, *Charles Boyde*ll returned the bill to the plaintiff, who brought the present action. It was contended, on the part of the defendant, that his discharge under the Insolvent Debtors' Act, was an answer to the action. The plaintiff obtained a verdict, with liberty to move to enter a nonsuit.

*Chandless* having obtained a rule accordingly,

*Erle* and *Jardine* shewed cause.—The action on the bill is not barred by the defence set up. *Charles Boyde*ll had a right, when the bill was dishonoured, to call upon the plaintiff for payment, and the latter would be entitled to his original claim, which was the consideration for the bill. There is no provision in the Insolvent Debtors' Act which renders the discharge a bar to other parties to the bill not named in the schedule, because the holder is prevented from suing; much less to extinguish the original debt. In *Macdonald v. Bovington* (a), which was decided on the Lords' Act, the holder of a bill sued

(a) 4 T. R. 825.

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the acceptor to judgment, and charged him in execution, and it was held, that the charging in execution at the suit of the holder was no satisfaction as between the drawer and the acceptor. If the drawer be called upon for payment, no agreement between the indorsee and the acceptor could discharge the latter. [*Parke, B.*—Suppose a release from the indorsee, whilst the bill was in his hands.] That would be an extinguishment of the debt; but where a prior party to a bill is called upon by the holder, the former is remitted to all his original rights. In *Mead v. Braham (b)*, it was held, that the drawer of a bill who paid the amount to the holder after a commission of bankruptcy against the acceptor, might sue the acceptor before he had obtained his certificate, though the holder had proved under the commission. [*Lord Abinger, C. B.*—The election of the holder to prove under the commission could not affect the other parties: to make the case analagous, you must shew that the holder proved under the commission and signed the bankrupt's certificate, and afterwards transferred the bill to the drawer, who then brought his action. The simple question is, whether the discharge extinguishes the debt, or merely bars the remedy.] Looking at the words of the act, it appears to be merely a discharge of the person. The 46th section empowers the Court to discharge the prisoner as to the debts due to the persons named in his schedule as creditors. [*Parke, B.*—There is no doubt this was a debt so long as it was in the hands of a third person. It would have been a good defence to an action for work and labour, that the defendant accepted a bill which was outstanding.] The plaintiff's name should have been inserted in the schedule as a creditor. [*Parke, B.*—At the time of filing the petition, the bill was in the hands of a third person, and there was no debt to the plaintiff: he could not at the time of the discharge have sued for work and labour.] The 61st section shews it was not the intention to destroy the debt, but only to bar the remedy.

*Chandless*, in support of the rule.—In *Macdonald v. Bovington*, which arose on the Lords' Act, there was a discharge as to a particular creditor only; but the Insolvent Debtors' Act contemplates a general arrangement for the purpose of releasing the insolvent from all his creditors. The 46th section shews it was the intention of the legislature to discharge the insolvent, not merely as to the *persons* named in his schedule, but in respect of all *debts* specified therein. The term "several persons" is inserted as descriptive of the debts. The debt inserted in the schedule as due to *Charles Boydell*, is the debt claimed by the plaintiff. The effect of giving a security for the debt was to give a capacity of transferring it; and the bill having been indorsed to *Charles Boydell*, he thereby acquired the privilege of being inserted in the insolvent's schedule, and of opposing his discharge. All that is necessary under the act is the identity of the debt. The latter part of the 46th section gives the power of inserting in the schedule the name of the drawer of the bill, where the holder is not known to the insolvent. [He was then stopped by the Court.]

LORD ABINGER, C. B.—The rule must be absolute. The case of *Macdonald v. Bovington* has no application to the present. The Lords' Act only

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operates to discharge a prisoner as to a particular creditor, but does not say a word about a discharge from the debt; but the Insolvent Debtors' Act is intended to put a debtor on the same footing as under a bankruptcy. Neither has the case of *Mead v. Braham* any application to the present: there the bankrupt had not obtained his certificate; but here, it appears to me, that the debt is discharged, and that, being so, there is no law which requires us to say that it revives when the bill gets back into the hands of the drawer; but, on the contrary, the act gives the debtor the facility of putting in the name of the drawer, when he does not know who the holder is, and so to be discharged from the bill. If he knows the name of the holder, that is the name he is to insert. Then the bill being discharged as to the holder, it cannot in any case revive. If the law were otherwise, it would be inconsistent with the policy of the act; it might happen that a debtor would be discharged as against a particular class of creditors, yet, with respect to those persons to whom he had given bills, he might be arrested *toties quoties*, according to the number of indorsements: if there were twenty indorsees, he might be liable to be arrested by every one of them but those whose names he had inserted in his schedule. The obvious meaning of the act is to discharge the insolvent from all his debts, upon his giving the best account of them, so that the creditors might have notice. Here he has inserted the name of the holder of the bill, and that is sufficient notice to all parties.

PARKE, B.—I am of the same opinion. *Macdonald v. Bovington* turned upon the provisions of the Lords' Act, by which it was the intention of the legislature not to discharge the party from the debt, but only his person from imprisonment. The Insolvent Debtors' Act is different: when once an insolvent inserts in his schedule such a description of the debt as he is able to give, he is altogether discharged as to that debt. I think this necessarily follows from the 46th and 61st sections. The 46th section empowers the Court to adjudge the prisoner to be discharged, "as to the several debts or sums of money"—not as to the several creditors—"due or claimed to be due at the time of filing such prisoner's petition, from such prisoner to the several persons named in his schedule as creditors; and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in his schedule." The objects of the latter part of the act is, that where an insolvent is indebted upon a negotiable security, and could not be reasonably expected to know the holder, it would be sufficient to describe the bill without naming the person: it is expressly enacted, that he shall be discharged if the instrument is so described in his schedule as to satisfy the Court that the debt must be known to those who are interested. That appears to me the reasonable and plain construction to be put upon the 46th section, and it is confirmed by the 61st, which provides, that if any person shall become entitled to the benefit of the act by any such adjudication as aforesaid, no execution shall issue;—not in respect of any creditor, but in respect of any debt. Such is the construction put by the Court upon the former insolvent acts. Thus in *Reeves v. Lambert (c)*, which arose on the 6th section of the 1 Geo. 4, c. 119, at the conclusion of the judgment it is said, "Besides, the prisoner is discharged as

to the debts mentioned in his schedule. Here the defendant has mentioned the original debt in his schedule, and he is discharged by force of the insolvent act as to that debt; and being discharged as to that debt, he is discharged from any claim arising by reason of a security given for that debt." That was the view taken by the Court, when the statute did not contain the enactment to which I have referred, which shews more strongly the intention of the legislature to distinguish between the *debt* and a mere discharge of the person.

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ALDERSON, B.—I am of the same opinion. It seems to me the intention of the act, that the party should be discharged from the debt, and that the object of the expressions referred to in the 46th section, is to identify the debt from which the party is to be discharged. The holder is named for the purpose of identifying the debt; that appears from the latter part of the section, by which, when the insolvent does not know the holder of a negotiable security, the security itself is to be set forth. That appears from various cases, in which it has been held, that though a debt is not accurately described, yet, if the description is such that the parties cannot be misled, it is sufficient.

Rule absolute.

### YEOMANS v. LEIGH.

CASE for negligent driving by the defendant's servant. *Plea*—Not guilty.

At the trial, before *Bolland*, B. at the *London* sittings, in *Michaelmas* Term, the defendant called the servant who was driving the carriage, when the accident occurred, as a witness on his part. It was objected, that he could not be examined without a release: the learned judge was of that opinion, and rejected the evidence. A verdict having been found for the plaintiff,

In an action for negligent driving, the defendant's servant is a competent witness for him, under 3 & 4 W. 4, c. 42, ss. 26, 27.

*Hindmarsh* moved to set aside the verdict and for a new trial.

*Petersdorff* shewed cause.—The question is, whether, notwithstanding the 3 & 4 W. 4, c. 42, s. 26, the witness should have been released. The preamble shews that the statute was obviously intended to apply only to cases in which there was no practical mode of rendering a witness competent. Where a party claimed under a right of common, or other customary or local right, a release would not have rendered him competent. [*Alderson*, B.—It is clearly the intention of the act, to apply to all cases in which the verdict would be evidence for or against the witness.] In *Mitchell v. Hunt* (a), which was an action for improperly digging a cellar near the plaintiff's wall, *Patterson*, J. held, that the workman who dug it was not a competent witness unless released. *Harrington v. Coswell* (b), *Harding v. Cobly* (c), *Burgess v. Cuthell* (d), *Hodson v. Marshall* (e), are to the same effect. It must be ad-

(a) 6 C. & P. 351.  
 (b) 6 C. & P. 352.  
 (c) 6 C. & P. 664.

(d) 6 C. & P. 282.  
 (e) 7 C. & P. 16.

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mitted that *Faith v. McIntyre* (f) is at variance with these decisions: there Mr. Baron Parke held, that in an action by indorsee against acceptor of a bill of exchange, the drawer was rendered by this statute a competent witness for the defendant. But in the case of the *Bailiffs of Godmanchester v. Phillips* (g), it was held, that the competency of a witness interested in the event of a suit could not be removed by the indorsement of his name on the record, under the statute. [Parke, B.—There the Court held, that a member of a corporation was not rendered a competent witness by a release of his interest to the corporation, because he, in effect, released himself.] The indorsement on the record would not produce the same effect on the mind of a witness as a release.

PARKER, B.—I am of opinion that the rule should be absolute. The section applies to all cases, where the only interest is, that the verdict in the action would be evidence for or against the witness. In this case there is no interest in the driver of the carriage, except that the verdict might be given in evidence, in an action by his master, to shew the amount of damage. There is a recent case in the Court of Common Pleas (h), in which that court takes the same view of the statute. I am of opinion that the act is not confined to cases in which it was before impossible to make a witness competent by a release. Here the effect of the act is to save the parties the expense of a release.

ALDERSON, B.—I am of the same opinion. The 26th & 27th sections, taken together, make the witness competent; giving the party the benefit of a release, by indorsing the witness's name upon the record. The object of the act is to save the expense of having a release.

BOLLAND, B.—I concur in the view which the Court takes of this case.

Rule absolute.

(f) 7 C. & P. 44.  
 (g) 6 N. & M. 211.

(h) *Bowman v. Willis.*

### ROBINSON v. CRESWELL.

A prisoner who was supersedable on mesne process, having obtained a rule nisi for his discharge, the plaintiff on the following day charged him in execution:—Held, that the rule nisi was no stay of proceedings, and that the defendant could not be discharged.

UDALL moved for a rule, calling on the warden of the Fleet prison to shew cause why he should not discharge the defendant out of custody, he being supersedable under the rule of H. T. 2 Will. 4, s. 88.

LORD ABINGER, C. B.—We cannot make the warden a judge of the fact: you may take a rule against the plaintiff.

On the following day, the defendant was charged in execution, at the suit of the plaintiff, and subsequently

*Mansel* shewed cause; and contended, that as the custody was charged by

The warden of the Fleet is not bound to judge of the fact of a prisoner being supersedable.

the charging in execution, the defendant could not now be discharged. He cited *Rose v. Christfield* (a), *Line v. Lowe* (b).

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*Udall*, in support of the rule, referred to *Pierson v. Goodwin* (c), where it was held, that if a defendant be supersedable for want of judgment being entered up in time, but not actually discharged, he could not be detained in an action on the judgment; the Court being of opinion, that the actual discharge of a prisoner related back to the time when he was supersedable.

Lord ABINGER, C. B.—Under the circumstances, I do not see how we can discharge the defendant; the rule was no stay of proceedings, and the defendant has been regularly charged in execution.

The case, however, stood over, until *Parke*, B. should be in court; and the rule was subsequently discharged with costs, the counsel for the defendant not appearing.

Rule discharged.

(a) 1 T. R. 591.  
(b) 7 East, 330.

(c) 1 B. & P. 361.

### CORRELL v. CATTLE.

**A**SSUMPSIT to recover the deposit paid upon the purchase of an estate.

The particulars of demand were as follows:—"This action is brought to recover the sum of 30*l.*, being the deposit paid by the plaintiff upon the purchase of a certain estate of the defendant, to which estate the defendant was unable to make a good title." A summons was taken out before *Gurney*, B., for further and better particulars, which was dismissed upon the plaintiff's attorney stating that the objections to the title were matters of law only. Subsequently the plaintiff's attorney sent to the defendant's attorney a notice, "that the objections to the title upon which the plaintiff would rely, were fully set forth in the plaintiff's answer to a bill filed by the defendant in the Court of Chancery for a specific performance." At the trial, before Lord *Abinger*, C. B., at the *Warwick* spring assizes, it appeared that the objection to the title was, that the defendant, who was tenant in tail of the property in question, had disposed of his life interest therein. On the part of the defendant it was alleged, that the deed by which he was represented to have sold his life interest, was a forgery. The jury found a verdict for the plaintiff with 30*l.* damages.

*M. D. Hill* moved to set aside the verdict, on the ground that the plaintiff was confined by his particular to objections in point of law. He contended that the notice operated as an agreement between the parties, that no objection should be raised, except such as were strictly of a legal nature.

*Parke*, B. inquired if the plaintiff's attorney would make an affidavit, that he verily believed that the plaintiff meant to confine himself at the trial to

Particulars of the plaintiff's demand, stated the action to be brought to recover the deposit paid upon the purchase of an estate, to which the defendant was unable to make a good title: a summons was taken out for better particulars, which was dismissed upon the plaintiff's attorney stating the objections were matters of law only. Subsequently a notice was sent to the defendant, that the objections were set out in a bill filed for a specific performance. The objection at the trial was matter of fact only. A verdict having been found for the plaintiff, the Court refused to set it aside, it not appearing that the defendant had been misled.

appearing that the defendant had been misled.

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points of law, and that he did not come prepared to meet a matter of fact, which, being answered in the negative, his lordship stated, that according to strict rule a summons should have been taken out to rescind the plaintiff's undertaking; but as it appeared the defendant has not been misled, the rule must be refused.

Rule refused.

### JONES v. HOWE.

The plaintiff having made default in trying his cause on the 10th of April, gave a fresh notice of trial for the 18th, when the cause was taken as undefended, and the plaintiff had a verdict. On the 14th of April the defendant moved for judgment as in case of a nonsuit, having given but one day's notice of the motion:—*Held*, that the Court could not give judgment as in case of a nonsuit.

One day's notice of motion for judgment as in case of a nonsuit, is not a stay of proceedings in this court.

*HOGGINS* shewed cause against a rule obtained by *Addison* for judgment as in case of a nonsuit. Notice of trial before the sheriff was given for the 31st of March, when the record was withdrawn in consequence of the absence of a material witness. On the 10th of April, fresh notice of trial was given for the 18th: on the 14th the defendant moved for judgment as in case of a nonsuit, having given one day's previous notice of the motion. The plaintiff tried the cause, as undefended, on the 18th, and obtained a verdict.

*Addison*, in support of the rule.—The plaintiff having failed to go to trial pursuant to the practice of the court, the defendant was then in a situation to move for judgment as in case of a nonsuit. The giving a fresh notice of trial does not preclude him. *Bainbridge v. Purvis* (a), *Smedley v. Christie* (b). [*Parke*, B.—The difficulty in this case is, that we cannot make the rule absolute when the plaintiff has obtained a verdict. Your notice of motion was no stay of proceedings.] In the other courts one day's notice is sufficient, and the rule of H. T. 2 W. 4, s. 68, which provides that "a rule nisi for judgment, as in case of a nonsuit may be obtained on motion, without previous notice; but in that case, it shall not operate as a stay of proceedings," will, by implication, make the notice the same in each court.

*PARKE*, B.—The defendant may set aside the verdict on payment of costs; and this rule will be discharged with costs, the plaintiff giving a peremptory undertaking, and it may be incorporated in the rule, that the defendant shall have the costs of the first default.

Rule accordingly.

(a) 1 Dow. P. C. 444.

(b) 2 Dow. P. C. 152.

### IKIN v. PLEVIN and others.

The issue misstated the date of the writ, used the word defendant, instead of defendants, and concluded with "thereupon the then sheriffs are commanded, &c.":—*Held*, that the issue was not irregular, but merely informal; and that the defendant should have applied to a judge at chambers, to amend it at the plaintiff's cost.

*COWLING* shewed cause against a rule, obtained by *Hoggins*, for setting aside the issue delivered in this cause for irregularity. The action was on a promissory note made by three defendants, but the issue throughout described them as the said defendant; the writ was stated to have issued in November, 1837, instead of November, 1836; and the conclusion was, "and thereupon the then sheriffs are commanded," &c. The defendant had not re-

turned the issue. *Cooling* contended that these errors did not make the issue irregular, but that the proper course was to apply to a judge at chambers to amend at the plaintiff's cost. Besides, the defendant, by accepting the issue, admits it to be properly made up.

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*Hoggins*, in support of the rule.—Since the new rules, the date of the writ must be correctly stated. In *Peel v. Ward* (a), a writ of trial had been obtained for trying the cause before the sheriff; but the issue delivered was in the form of an issue at *Nisi Prius*, and the Court set aside the issue, the writ of trial, and notice of trial. The authority cited does not apply, since a precise form has been given by virtue of an act of parliament.

ALDERSON, B.—There was no necessity to make this application to the Court; the proper course was to apply to a judge at chambers, to amend the issue at the plaintiff's cost. In *Peel v. Ward* the issue was drawn up in a form which did not give the judge any power to make the order for the writ of trial; though in that case, it seems to me, the more correct judgment would have been to have set aside the writ of trial and the notice of trial only; as I do not see how the issue, which was regular at the time it was delivered, could be made irregular by any subsequent proceedings. Here, however, the issue is not irregular, but merely informal. The present rule will be discharged without costs; and then the plaintiff should apply to a judge to amend, which will be allowed on payment of costs.

Rule accordingly.

(a) 5 Dow. P. C. 169. 1 M. &amp; W. 743.

## PLATT v. HALL.

THIS was an action of *indebitatus assumpsit*, which came on for trial at the last *Liverpool* assizes, when a verdict was taken by consent for the plaintiff, subject to the award of an arbitrator, who was to be at liberty to reduce or vacate the verdict. The arbitrator awarded that the plaintiff was entitled to demand of the defendant the sum of 90*l.*, in respect of the causes of action in the declaration mentioned; and that the defendant was entitled to set off, against such demand, 35*l.* for journeys and expenses mentioned in the particulars of the defendant's set-off; and that the defendant should deliver up to the plaintiff certain securities mentioned in the award.

*Crompton* had obtained a rule to shew cause why the *postea* should not be delivered to the plaintiff, in order that he might enter a verdict for 55*l.* pursuant to the arbitrator's award. The rule was drawn up "on reading the affidavit of J. C. (the arbitrator's clerk), and the *paper writing* thereto annexed." The *paper writing* was a copy of the award, which was verified by the affidavit.

A cause was referred to an arbitrator, who was to be at liberty to reduce or vacate the verdict, taken by consent. The arbitrator awarded, that the plaintiff was entitled to demand of the defendant 90*l.*; and that the defendant was entitled to set off 35*l.*; and that the defendant should deliver up to the plaintiff certain securities:—*Held*, that the award sufficiently ascer-

tained the amount for which the verdict was to be entered.

In drawing up a rule, it is not necessary to specify the particular document on which it is obtained, but it may be described as a *paper writing*, provided it be properly verified by affidavit.



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*Willmore* shewed cause; and objected that the rule was improperly drawn up, inasmuch as the document itself should have been specified. He referred to *Sherry v. Oke* (a). [*Parke*, B.—That decision proceeded on the ground that there was no affidavit that the paper writing annexed was a true copy of the award. *Alderson*, B.—There the rule was not drawn up upon reading the award, but upon reading a paper writing purporting to be a copy of the award, but which did not appear to be a true copy.]

Then the award is not final: the arbitrator has neither vacated the verdict nor reduced the damages; nor has he ascertained any sum to be due from the defendant to the plaintiff. Consistently with this award, the plaintiff may be the debtor of the defendant, after the securities are given up.

*PARKE*, B.—The arbitrator finds 90*l.* to be due to the plaintiff, from which is to be deducted the 35*l.* due to the defendant. That sufficiently ascertains the amount to which the plaintiff is entitled.

Rule absolute.

(a) 1 Har. & Woll. 119. 3 Dowl. P. C.


### EDWARDS v. JONES.

*Seemle*, that a party who is arrested and goes to prison, is "arrested and held to special bail," within the meaning of the 43 Geo. 3, c. 46, s. 3.

The indorsee of a promissory note, who has given some value for it, may arrest the maker for the whole amount, notwithstanding it was an accommodation note, as between the prior parties, provided the holder had no knowledge of that fact.

*THOMAS* obtained a rule to tax the defendant his costs under the 43 Geo. 3, c. 46, s. 3. The defendant was arrested for 100*l.* on a promissory note made by him, and indorsed to the plaintiff. The defendant pleaded, that before the making of the note, one *Evan Jones* sold to him an undivided moiety of a sloop, called the *Mary Ann*, for the sum of 100*l.*, and in consideration that the said *E. Jones*, by writing under his hand, then agreed with the defendant, that the said sum of 100*l.* should be payable when and as the said sloop might earn the same by carrying goods for the said *E. Jones*, and not before; and that the said *E. Jones* would constantly employ the said sloop in carrying goods for him at reasonable freight, until the said sum of 100*l.* was liquidated and discharged by the amount of freight to be due to the defendant for such carriage; and that in the event of the defendant refusing or neglecting to carry goods of the said *E. Jones* in the said sloop, at reasonable freight, in liquidation and discharge of the said sum of 100*l.*, and not otherwise, the said promissory note should be enforced; and on the considerations aforesaid, and upon no other consideration whatever, the defendant made the promissory note. Averment, that the defendant was always ready and willing to carry the goods of *E. Jones*, pursuant to the agreement, but that he refused to employ the sloop for that purpose, and so the consideration upon which the note was made and delivered by the defendant to *E. Jones*, had wholly failed, and that *E. Jones* indorsed the note to the plaintiff without value or consideration. The plaintiff replied as to 49*l.* 2*s.* 1*d.* parcel of the sum of 100*l.* in the declaration mentioned, that *E. Jones* indorsed the note to him, and that he took and held it for a good and sufficient consideration, and for value to that amount; and as to the residue of the said sum of 100*l.*, the plaintiff entered a *nolle prosequi*. The plaintiff obtained a verdict for 49*l.* 2*s.* 1*d.* The defendant having

both arrested, lay in prison until he was discharged under a judge's order, on account of a defect in the affidavit to hold to bail.

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*E. V. Williams* shewed cause.—The question is, whether the defendant has been arrested and held to special bail within the meaning of the 43 Geo. 3, c. 46. The third section enacts, that in all actions wherein the defendant shall be “arrested and held to special bail,” and the plaintiff shall not recover the amount of the sum for which the defendant shall have been so arrested and held to special bail, the defendant shall be entitled to costs. In *Bates v. Pilling* (a), the defendant was not arrested in consequence of his attorney undertaking that a bail-bond should be given, and it was decided, that such a case was not within the act. *Bayley, B.* says, the words are not “where the defendant shall be arrested” alone, or “held to special bail” alone, nor are the words “arrested” and “held to special bail” synonymous, so as to make one of them useless and nugatory, but they mean different things, and are distinct proceedings, in which different parties act; and *Vaughan, B.* expressly says, “it has been asked, if the putting in bail will not do without an arrest: will an arrest without putting in bail? To which I answer—no: both must concur.” [Lord *Abinger, C. B.*—It may be said, that a man who voluntarily gives special bail is in no sense arrested. If a man be arrested, he is in custody until he gives special bail. What, after all, do special bail do but pay the debt or render the defendant? The judgment of *Vaughan, B.* in *Bates v. Pilling*, was not necessary for the point under consideration, which was, that there must be an arrest first.] In *Amor v. Blofield* (b), process issued against a defendant, and his attorney gave an undertaking to put in bail: the defendant afterwards obtained leave to enter a common appearance, on account of a defect in the affidavit to hold to bail, and it was held the defendant was not entitled to costs. In *Wilson v. Broughton* (c), *Parke, J.* certainly expressed some doubt on the point. [*Parke, B.*—If a party be arrested, and placed under the obligation of giving special bail, would not that satisfy the statute: if he should be arrested, and immediately afterwards told he need not put in special bail, but only enter a common appearance, that would not be a case within the statute, for he himself waives the benefit of it; but if he be placed under the obligation of giving special bail, is not that enough?] The most convenient view of the statute would be, that no person is entitled to the benefit of it unless he is arrested, and after his arrest, is held in custody until he puts in bail, or is discharged by due course of law. Here the defendant has not been discharged by due course of law, but by taking advantage of a defect in the affidavit to hold to bail. It is clear, that the term *special* bail is put in contradistinction to *common* bail; but here the defendant has got out of custody on filing common bail. [*Alderson, B.*—If you look at the act, it is evident the legislature contemplated an arrest: the reasons upon which the judges decided *Bates v. Pilling*, are utterly irreconcilable with the point before them.]

Secondly, it does not appear that the plaintiff knew this to be an accommodation note between the original parties, and if so, he was entitled to arrest for the whole amount.

*Thomas*, in support of the rule.—The preamble of the act explains the inten-

(a) 2 C. & M. 374.

(b) 9 Bing. 91; 2 M. & Scott, 156.

(c) 2 Dow. P. C. 631.

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tion of the legislature. It is "for the more effectual prevention of frivolous and vexatious arrests, and for the relief of persons imprisoned on means process." Suppose a person is arrested, and being unable to procure bail, lies in prison until after verdict; would not such a case be within the statute? Where there is such an arrest as compels the party to give bail, that satisfies the act. The cases cited have no application to the present question.

LORD ABINGER, C. B.—We are not called upon to make any decision as to whether this case is within the statute, since it does not appear that the plaintiff had any knowledge that this was an accommodation note; if he had, and then, without having given consideration, had arrested the defendant for the whole amount, the question would have arisen. But there is nothing improper in a party who holds a bill, for which he has given some consideration, suing for the whole amount, unless he is aware there is no other claim beyond his. If it were not so, in what a situation would bankers be, who have a lien upon bills for the balance due from their customers; it may be less than the amount of the bills pledged; but they would be acting improperly not to sue for the whole. If there has been any malice, as suggested, the defendant has his remedy by action.

PARKER, B.—We are not called upon to say whether this case is within the statute, because the defendant is not in a condition to apply. The plaintiff is the holder of a promissory note for 100*l.*, and for which he has given 40*l.*; *prima facie*, he might recover the whole amount, because the holder of a bill has not only his own title, but also the title of the prior parties. It is by no means clear, that the payee could not sue upon the note, since it would be no answer to produce an agreement to substitute a different mode of payment from that provided by the note itself. Probably the plaintiff has exercised more caution than was necessary, and has even exposed himself to the risk of proceedings on the part of the drawer.

BOLLAND and ALDERSON, Bs. concurred.

Rule discharged.

### ALDRIDGE v. BULLER.

The defendant was outlawed in May, 1836. In February, 1837, he signed judgment as in case of a nonsuit, and, in the March following, sued out a *habeas corpus*, to charge the plaintiff in execution for the costs of that judgment; *Held*, that a motion on the 29th April, to set aside the *habeas*, was not too late, no step having been taken upon it.

An outlaw cannot appear in court except to reverse his outlawry.

PRICE had obtained a rule to set aside a writ of *habeas corpus*, to charge the plaintiff in execution, on the ground that the defendant was an outlaw. The outlawry, which was at the suit of another plaintiff, took place in May, 1836. In February last, the defendant signed judgment as in case of a nonsuit, and in March last sued out the *habeas corpus*, to charge the plaintiff in execution for the costs of that judgment. The present rule was obtained on the 29th April.

J. W. Smith shewed cause, and contended, that the application was too late.

*Held*, that a motion on the 29th April, to set aside the *habeas*, was not too late, no step having been taken upon it.

[Lord Abinger, C. B.—The object of the *habeas corpus* is to enforce the defendant's claim; the plaintiff must either go into custody or pay the money. If the defendant had brought an action on the judgment, his outlawry might have been pleaded; but, as it is, the objection could not have been taken in any other form than this.] The rule which prohibits an outlaw from taking any step in a cause, applies to plaintiffs and not to defendants. [Parks, B.—In this case the defendant, by enforcing the payment of costs, is acting as a plaintiff. Lord Abinger, C. B.—Suppose the defendant had brought an action upon the judgment.] In that case, the plaintiff must have pleaded the outlawry in abatement, and that he must have done within four days; Vin. Ab. Outlawrie. *Clark v. Scroggs* (a). As there is a remedy by *audita querela*, the Court will not exercise its equitable jurisdiction by motion; *Symons v. Blake* (b). [Parks, B.—The plaintiff could not have an *audita querela*, the form of it is "*audita querela defendantis*."] The defendant's attorney would have a lien upon the judgment for his costs.

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Price, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—The principle is clear; nothing more so. The defendant is seeking to obtain the fruits of his judgment; and as the plaintiff is in custody, he sues out an *habeas corpus*, to charge him in execution. He is then making use of the authority and the process of a court of justice, in order to enforce his claim. It is long settled, that an outlaw cannot appear in court, except to reverse his outlawry, and we ought not now to make any exception to it.

PARKS, B.—I doubted whether the application was in sufficient time; but as the defendant has not taken any step upon the *habeas*, I think it is.

(a) Lutw. 315; Anonymous, 3 Salk. 275.

(b) 2 C. M. & R. 416.

### DONCASTER v. CARDWELL.

ADDISON shewed cause against a rule obtained by *W. H. Watson*, for the costs of the day, for not proceeding to trial. The defendant was under terms to accept short notice of trial, which was given for the *Liverpool* assizes, on the 25th March. This notice was countermanded on the 21st. It was contended that, as the defendant was bound to accept short notice of trial, six days' notice of countermand was not necessary. The rule of H. T. 2 W. 4, s. 61, required six days' notice of countermand, *unless* short notice of trial was given.

Where the plaintiff gives short notice of trial, there can be no countermand.

PARKS, B.—The officer informs us there can be no countermand where the plaintiff gives short notice of trial; therefore he must pay the costs.

Rule accordingly.

*Exchequer.*MAN and another *v.* Lord AUDLEY.

Where the party to a cognovit died in *Hilary* Term, the Court refused, in *Easter* Term following, to permit judgment to be entered *nunc pro tunc*.

**DASENT** moved for a rule, calling on the executors of the defendant to shew cause why judgment should not be entered up on a cognovit. The cognovit was dated *February*, 1833, and the defendant died on the 15th of *January* last. It was submitted, that the Court had power to order judgment to be entered *nunc pro tunc*. Arch. Prac. by Chit. 490.

**PARKE, B.**—There is no precedent for such an application as this.

On a subsequent day, *Dasent* stated that the Court of King's Bench had granted a similar rule in the case of *Harrison v. The Executors of Sir G. Nayler*.

**F. Kelly** stated that he had moved, in the case referred to, and the Court seemed to be of opinion, that it was sufficient if the motion was made within a reasonable time after the death of the party, inasmuch as until the will was proved, there would not be any one on whom the rule could be served. No motion was made for making the rule absolute, in consequence of matter being settled.

**LORD ABINGER, C. B.**—Before the new rules there was relation of a term, and where a defendant died in vacation, and application was made on the first day of the following term, the Court would permit judgment to be entered as of the preceding term; but this is an application in *Easter* Term to enter up judgment against a party who died in *Hilary* Term: that could not have been under the old practice.

**PARKE, B.**—Judgment *nunc pro tunc* applied to cases where there was a delay of the Court, and it would not allow a party to be prejudiced thereby.

MARRYAT *v.* BRODERICK.

Where the rules of certain races provided that all disputes should be settled by the stewards:—*Held*, that the plaintiff could not recover the stakes upon an award in his favour by one steward, although the other had stated he would acquiesce in whatever his colleague did. To make the award of one steward available, there must be clear evidence that both parties, and also the stakeholder, consented to abide by his sole decision.

*Semble*, that where a horse-race is legal, a party cannot recover back his stake after the race has been run, though the stakeholder has not paid over the money: at all events, he must demand it before the race is run.

**ASSUMPSIT** for money had and received. *Plea*—Non-assumpsit. At the trial, before *Littledale, J.* at the last *Northampton* assizes, it appeared that the defendant was the clerk of the *Newport Pagnel* races, and that the action was brought either to recover the sum of 60*l.* which the plaintiff alleged to have been won by a horse of his, or to recover back the amount of his stake. The plaintiff's horse ran for a sweepstakes for horses not thorough-bred, and came in second. A horse named *Cricketbat*, which was the property of a Mr. *Shaw*, and thorough-bred, came in first. Before the race was run, the plaintiff

gave the defendant notice that *Cricketbat* was disqualified to start. By the rules of the races, all disputes were to be determined by the stewards, who on this occasion were Lord *Charles Fitzroy* and General *Grosvenor*; neither of whom were present. General *Grosvenor* had been named a steward without his knowledge; but told Lord *Charles Fitzroy* that he would acquiesce in whatever the latter might do. A Mr. *Bayley* attended at the races for Lord *Charles Fitzroy*, but refused to determine the dispute in question. Lord *Charles* subsequently wrote to the plaintiff, that in his opinion the plaintiff was entitled to the stakes. The plaintiff gave in evidence a letter from *Shaw* to Lord *Charles Fitzroy*, in which he tendered certain facts for his lordship's consideration. There was no proof that *Cricketbat* was in fact thorough-bred. It was objected that the plaintiff could not recover without an award in his favour by both the stewards, and the learned judge being of that opinion, nonsuited the plaintiff.

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*Humfrey* now moved to set aside the nonsuit.—First, the plaintiff is entitled to recover the whole stake. The other steward having acquiesced in the decision of Lord *Charles Fitzroy*, it is the decision of the party having the entire authority. In *Rex v. Whitaker* (a), an apportionment of a rate under a local drainage act, by two of three assessors, was held sufficient, on the ground of its being a matter of public duty and public trust. So here the stewards are not in the nature of arbitrators, but of judges publicly appointed. [*Parke*, B.—It cannot be said that they have any public duty.] There is evidence that the parties agreed to leave the dispute to Lord *Charles Fitzroy*; *Shaw's* letter shews that he did not repudiate Lord *Charles's* authority. [*Parke*, B.—That letter might be evidence of an agreement, that Lord *Charles* should subsequently make an award.] Secondly, if a valid award has not been made, the event upon which the stake was deposited is still undecided, and the plaintiff is entitled to recover it back. *Bate v. Cartwright* (b). If the stewards do not decide, the defendant may keep the stake altogether. [*Parke*, B.—The money remains in his hands to abide the decision of the arbitrators or of the law; if the arbitrators cannot settle the dispute, the law will: supposing the plaintiff entitled to recover back his own stake, he ought at all events to have demanded it back before the race was run.] The case resembles an ordinary arbitration, in which at common law the arbitrators' authority might have been revoked at any time before award made. [*Parke*, B.—That proceeds on the principle that the authority of an arbitrator is a countermandable authority. In *Eltham v. Kingsman* (c), Lord *Ellenborough* certainly applied that principle to the case of a stakeholder, but I very much doubt its applicability.

*PARKE*, B.—I am of opinion that there is no ground for this rule. Unless there has been a written agreement varying the rules of the races, both stewards must concur to render the arbitration valid. To make an award of one binding, there must be distinct proof that both parties—and probably also the clerk of the course—submitted to his authority. The letter of *Shaw* at most amounts to an agreement that something should thereafter be done by Lord *Charles Fitzroy*. The question then is, whether the plaintiff is en-

(a) 9 B. & C. 648.

(c) 1 B. & Ald. 683.

(b) 7 Price, 240.

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titled to recover back his own stake. I think not. It was deposited to abide the event of the race, subject to the the decision of the stewards. If the stewards are incompetent to decide the question, it must be settled by a jury. Even if the plaintiff had demanded back his stake before the race was run, I doubt whether it would be recoverable, this being a legal horse-race, and the money being deposited to abide the event. If, however, the case rested on that point, I should wish a rule to be granted, in order that it might be fully considered, as there is a case to the contrary. Here, however, no demand has been made, and the money remains in the defendant's hands until it is determined who is the winner. The plaintiff may submit his case to the stewards, if they are competent to entertain it; if not, he may bring an action, and prove himself to be the winner, by shewing that *Shaw's* horse was thorough-bred.

ALDERSON, B.—I am of the same opinion. I also entertain great doubt whether the analogy suggested in *Eltham v. Kingsman* is a sound one: it appears to me that the authority of a stakeholder is not countermandable.

Rule refused.

### DOE dem. LEWIS LEWIS v. REES DAVIES.

A., and B. her daughter, being respectively seized in fee of certain lands, by indenture, dated 15th November, 1822, after reciting that a marriage had been agreed upon between the defendant and B., it was witnessed in consideration of 2*l.* to be paid by the defendant, and in consideration of the said intended marriage, and also in consideration of 10*s.* to A. and B. paid by L. L. and D. D., the said A. and B. did respectively grant, bargain, sell, alien, enfeoff, and confirm to L. L. and D. D. their respective portions of the lands, to hold the same to the said L. L. and D. D. to the use of the defendant for life, with remainder over. The defendant married B. shortly after the execution of the deed, and went to reside with A., and continued in possession of the premises up to the time of trial. A. died in 1831, and B. in 1836. The deed contained an indorsement of livery of seisin, but there was no evidence of livery having been made, nor did it appear that the trustees were in any way related to the grantors.

*Held*, that the deed operated as a covenant to stand seized to the use of the defendant.  
*Seemle*, that no possession short of twenty years is sufficient to warrant a jury in presuming livery of seisin.

**EJECTMENT** to recover a small estate in *Cardiganshire*. At the trial, before Lord Denman, C. J., at the *Cardigan* summer assizes, 1836, it appeared that the lessor of the plaintiff claimed part of the property, as heir at law of his mother, *Ann Lewis* the elder, and the residue as heir at law of his sister, *Ann Lewis* the younger. The defendant, who had married *Ann Lewis* the younger, claimed a life interest in the estate. Under an indenture dated the 15th of November, 1822, and made between *Ann Lewis* the elder of the first part, and *Ann Lewis* the younger of the second part, the defendant of the third part, *Lewis Lewis* and *David Davies* of the fourth part; whereby after reciting that *Ann Lewis* the elder and *Ann Lewis* the younger were respectively entitled to the premises therein described, by purchase from the commissioners under an inclosure act, and that a marriage had been agreed upon, and was intended to be had and solemnized, between the defendant *Rees Davies* and *Ann Lewis* the younger; and that, upon the treaty for the marriage, it had been agreed upon, by and between *Ann Lewis* the elder and *Ann Lewis* the younger, in manner following; that is to say, she, the said *Ann Lewis* the elder, on her part, did thereby undertake and agree to convey and assure unto the said *Lewis Lewis* and *David Davies*, and their heir in trust for the uses and purposes thereafter mentioned and expressed of and concerning the same, in consideration of 2*l.* to be paid to her by the defen-

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dant at or before the execution of those presents, the said messuage, &c. (describing the premises of *Ann Lewis*, the elder,) and the said *Ann Lewis* the younger, on her part did thereby also undertake and agree to convey and assure unto the said *Lewis Lewis* and *David Davies*, and their heirs in trust for the uses and purposes thereafter mentioned and expressed of and concerning the same, &c. (describing the premises of *Ann Lewis* the younger): it was by the said indenture witnessed, that in consideration of the sum of 2*l.* to the said *Ann Lewis* the elder, in hand, well and truly paid by the defendant at and before the sealing and delivering of the said indenture, the receipt whereof, and that the same was in full for the absolute purchase of the hereditaments thereafter granted and enfeoffed, or intended so to be, and the fee simple and inheritance thereof in possession, free from incumbrances, she, the said *Ann Lewis* the elder, did thereby admit and acknowledge, and for and in consideration of the said intended marriage, and of the [here was an erasure in the deed] paid by the defendant at the request of the said *Ann Lewis* the younger, the receipt whereof was thereby acknowledged, and also for and in consideration of the sum of 10*s.* to each of them, the said *Ann Lewis* the elder, and *Ann Lewis* the younger, by the said *Lewis Lewis* and *David Davies*, in hand, respectively paid at or immediately before the execution of the said indenture, the receipt whereof was thereby acknowledged, she, the said *Ann Lewis* the elder, so far as related to the said messuage, (her part of the premises,) and the said *Ann Lewis* the younger, so far as related, &c., (her part of the premises,) did, and each of them did, grant, bargain, sell, alien, enfeoff, and confirm unto the said *Lewis Lewis* and *David Davies*, their heirs and assigns, all and singular, &c., (the premises in question,) with their appurtenances, in as large, ample, and beneficial a manner as the said *Ann Lewis* the elder and *Ann Lewis* the younger purchased the same from the commissioners, to have and to hold the same respectively, with their appurtenances, unto the said *Lewis Lewis* and *David Davies*, their heirs and assigns, to such uses and upon such trusts, and to and for such intents and purposes, and subject to such provisions and agreements, as were thereafter mentioned, expressed, and declared of and concerning the same, that is to say, to the use and behoof of the defendant and his assigns, for and during the term of his natural life, without impeachment of waste, and from and after his decease, to the use of *Ann Lewis* for life, with remainders over.

This indenture contained the following indorsement:—"Be it remembered, that this day of , one thousand eight hundred and twenty-two, peaceable and quiet possession and seisin of the messuage and dwelling-house, fields, closes, pieces or parcels of land, and all the premises within granted and enfeoffed, were delivered by the within-named *Ann Lewis* the elder and *Ann Lewis* the younger to the within-named *Lewis Lewis* and *David Davies*, to hold to them the said *Lewis Lewis* and *David Davies*, their heirs and assigns, according to the tenor and effect of the within deed, in the presence of us whose names are hereunto subscribed."

No names were subscribed to this memorandum, nor was there any evidence of livery of seisin; nor did it appear that *Lewis Lewis* and *David Davies* were related to either *Ann Lewis* the elder or *Ann Lewis* the younger.

The indenture was duly executed by *Ann Lewis* the elder, *Ann Lewis* the younger, and the defendant.

The defendant went to live with his wife's mother upon the marriage, and



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continued to live with her until her death, which happened about 1831, and remained in possession of the premises up to the time of trial.

The defendant's wife died about 1835.

It was contended, on the part of the defendant—first, that the deed operated as a feoffment, as livery of seisin might be presumed from the fact of possession by the defendant; secondly, if it was not to be presumed, the deed would operate as a covenant to stand seised; thirdly, that, as to the share of the daughter, the mother was tenant in possession, and that the deed would operate as a grant of the reversion. Upon referring, however, to the evidence, it appeared there was no proof that the mother was tenant to the daughter; and therefore that objection failed.

The learned judge was of opinion, in conformity with the decision of *Doe v. the Marquis of Cleveland* (a), that the possession ought not to be left to the jury as evidence of livery of seisin, as it was for a less period than twenty years; but in order to save expense, he left the question to the jury, who found the fact the livery of seisin was made; but notwithstanding that finding, his lordship directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a verdict or a nonsuit.

*J. Wilson* having, in *Michaelmas* Term, obtained a rule accordingly,

*E. V. Williams* and *Nicholl* shewed cause.—First, there is not sufficient length of possession to warrant the jury in presuming livery of seisin. The rule of law is stated by *Littledale, J.*, in delivering judgment in *Doe v. the Marquis of Cleveland* (b). He there says, "It seems to me, that no possession short of twenty years was sufficient to warrant the jury in presuming the fact of livery of seisin in this case. Here, therefore, there has not been a sufficient possession to constitute presumptive evidence of livery of seisin having been made. There was no actual proof of the fact of livery of seisin, and a feoffment without livery passes only an estate at will."

But, secondly, it is contended, that though this instrument will not enure by way of feoffment, it may be good as a covenant to stand seised. If the intended feoffment had been to the husband's relations, it might have so operated; but here there can be no covenant, because there is no consideration of blood or marriage to support it. The grant is to the trustees, who are mere strangers, and the deed does not contain any covenant that the *cestui que trust* shall enjoy according to the uses. In *Hore v. Dix* (c), one J. P. being seised in fee of certain lands, in consideration of natural love and affection for his son, gave, granted, and enfeoffed two strangers of the said lands, to hold the same for the use of himself for life, with remainder to his son in tail, and covenanted with the strangers that they should enjoy the lands to and for the uses before specified, and the deed was never executed by livery; the Court decided, by the first resolution, that no estate passed to the trustees, because they were strangers; and, for the same reason, the Court also resolved, that the express covenant raised no use in the covenanters. It is true that Mr. Serjeant *Williams*, in his note to the case of *Chester v. Willan* (d), seems to consider *Hore v. Dix* as overruled by *Roe v. Tranmarr* (e), but his observation must be

(a) 9 B. & C. 864.

(b) 9 B. & C. 871.

(c) 1 Sid. 25.

(d) 2 Saund. 97 a, n. 1.

(e) Willes' Rep. 682; S. C. 2 Wils. 75.

confined to the resolution in that case, that an instrument intended to operate in one way cannot be construed so as to operate in another; he could never have meant that *Hore v. Dix* was overruled as to the first resolution, namely, that a use under a covenant to stand seised cannot be raised in favour of a stranger.

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In 2 *Saunders on Uses* (f), it is said, that if a man covenant to stand seised for the use of himself for life, with remainder to the use of trustees, (who are not his relations,) for the purpose of preserving contingent remainders, no use would vest in the trustees, because the consideration does not extend to them. *Thorne v. Thorne* (g) is distinguishable, since that was the decision of a court of equity; and from anything that appears, the conveyance might have been made for a valuable consideration; in which case that court would have carried it into effect. Besides, in *Thorne v. Thorne*, there was an express covenant that the *cestui que trust* should enjoy according to the uses, which fact is adverted to by Chief Baron Comyn as the ground of the decision (h). It is also very probable, that the trustees in that case were relatives; the report is short, and *Vernon* is notoriously inaccurate. In *Doe v. Simpson* (i) there was a consideration to raise the use; for, although one of the grantees was a stranger, yet the other was the intended wife of the grantor; and it has been held, that where there is a covenant to stand seised to the use of a relation and a stranger, the use will enure to the relation (k). There was also an express covenant that the grant should remain to the uses; and when the uses took effect, the grantor and his wife were both dead; and the question did not arise until after the objectionable uses had expired. In *Roe v. Tranmarr* (l) there was an express covenant to a relation. So in *Osman v. Sheaf* (m) and *Baker v. Lade* (n) the grantees were relatives. Though the grant in *Sleigh v. Metham* (o) was to strangers, yet the covenant was with them that the intended wife should enjoy; and there also there was an express covenant that the grant should remain to the uses. At all events, the deed cannot operate as a covenant to stand seised as to the mother's part of the property, since the consideration for that part is averred to be pecuniary; and to say that the real consideration was the marriage of the daughter, would be to set up a consideration inconsistent with that expressed in the deed.

*J. Wilson*, in support of the rule.—Livery of seisin was a matter of fact to be determined by the jury, and they are fully warranted in their finding. For twelve or thirteen years a state of things has existed, which could not have been unless the ceremony of livery had been performed. The jury have presumed that all has been done which it was the bounden duty of the parties to do with respect to the feoffment, and which they might have been compelled to do by a court of equity. Where the jury found a verdict on a presumption contrary to evidence, the Court refused to interfere, the finding being consistent with the justice and equity of the case. *Wilkinson v. Payne* (p). [*Parke, B.*—It is to be hoped that there are not many cases of that kind. They are

(f) P. 83.  
 (g) 1 Vern. 141.  
 (h) Com. Dig. Covenant (G. 2.)  
 (i) 2 Wilson, 22; S. C. Willes, 673, by the name of *Doe v. Salkeld*.  
 (k) 2 Roll. Ab. 784; Pl. 2 & 4.

(l) Willes, 682. S. C. 2 Wils. 75.  
 (m) 3 Lev. 372.  
 (n) 3 Lev. 291.  
 (o) 1 Lutw. 782.  
 (p) 4 T. R. 846.

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calculated to make bad law.] The dictum in *Doe v. the Marquis of Cleveland* (q), that no possession short of twenty years is sufficient to warrant a presumption of livery, was extrajudicial, the point in that case being, whether evidence of the handwriting of an attesting witness could be received without first proving his death.

Secondly, there is a legal use arising to the husband; under which he is entitled to this property for life. It is not contended, that a use arises in favour of the trustees, but the question is, whether a party cannot covenant with a stranger that he will stand seised to the use of a relative. [*Parke, B.*—There may be a covenant with a stranger that a relative shall enjoy; but if the covenant is with a stranger that the stranger shall enjoy, though for the use of a relative, the cases say the covenant is void.] *Thorne v. Thorne* (r) was decided many years after *Hore v. Dix* (s); and on referring to the registrar's book (t), it will be found, that the case did not turn upon a valuable considera-

(q) 9 B. & C. 864.

(r) 1 Vern. 141.

(s) 1 Sid. 25.

(t) *Thorne v. Thorne*—Registrar's Book, 22nd February, 1682.—The bill, which was by *Henry Thorne* against *Roger Thorne* and *Michael Warren*, stated, that, on the 2nd of December, 13 Car. 1, *John Thorne*, plaintiff's uncle, did, by deed, for the settling and continuing in his name and blood, and for other good causes and considerations, all his lands called *New Mill, &c.*, give, grant, enfeoff, and confirm unto *Edmund Cudmore* and *Robert Hawke, Esqrs.*, since deceased, and their heirs, all, &c., in trust, to the uses following:—To the use of himself for life, remainder to the use of *Sarah May*, his only daughter and heir, and the heirs of her body; remainder to the use of *Henry Thorne* and the defendant *Roger Thorne*, brothers of the said *John Thorne*, and one *John Thorne*, son of *Zachary Thorne*, another brother of the said *John Thorne*, and the heirs of their bodies, equally to be divided between them. That the settlor died, and that *Sarah May* is also dead, and her issue. That *Henry Thorne*, brother of the grantor, died before *Sarah May*, leaving *John Thorne* his eldest son and heir, and brother to the plaintiff, which *John Thorne* is dead, without issue, and plaintiff is the next son and heir of the said *Henry* and *John Thorne*; and the defendant, *Roger Thorne*, being living, and also *John Thorne*, son of *Zachary*, the lands descended to them and the plaintiff as tenants in common. That the defendant *Roger Thorne* having, for some inconsiderable sum, bought of *John Thorne*, the son and heir of *Zachary*, who was eldest brother and heir of *John*, the grantor, who died without issue, all his right to the aforesaid lands, the defendant pretends that the aforesaid deed of settlement was not sufficiently executed, and therefore the plaintiff hath no title to the same, nor any part thereof, and hath entered on the premises, and receives the profits of them, and having gotten the deed of settlement, refuses to let the plaintiff have a third part of the premises. The bill prayed that the plaintiff might enjoy a third

part of the premises, and have an account of the yearly value thereof, and of the profits since the defendant hath received the same, and that the lands may be set out and divided according to the purport of the said settlement.

The defendant, *Roger Thorne*, admitted that he hath in his custody a writing, dated the 2nd of December, 13 Car. 1, purporting to be a grant of the lands by *John Thorne* to *Cudmore* and *Hawke* to the uses in the bill, and to which a seal is affixed, and the name of *John Thorne* thereunto subscribed, and is mentioned to be sealed and delivered by *John Thorne*, but believes it was never executed so as to convey the estate thereby intended to be conveyed; and that in the writing there is a power of revocation reserved to the said *John Thorne* of the whole contents thereof; that *John Thorne* did by deed indented the 24th of February, 29 Car. 1, grant and convey part of the premises to the defendant, his heirs and assigns, by way of mortgage; that the money was not paid; that *John Thorne* died seised in fee simple of all the rest. That the premises whereof he died seised descended to *Thomas May*, his grandson, who dying without issue, it came to *John Thorne*, eldest son and heir of *Zachary*, who was eldest brother to *John*, (grantor,) who died seised, who thereupon entered on the premises, and for valuable consideration conveyed to the defendant *Roger Thorne*, in fee, by lease and release; and the defendant, being a purchaser, doth claim the same and the profits thereof since the purchase, and is advised that the plaintiff hath no title to the premises.

Whereupon, and upon long debate of the matter, and upon producing of the aforesaid deed of settlement, the Court declared, that the same was a good conveyance, and did amount to a covenant to stand seised; and the uses and estates thereby limited and created were well raised; and that the plaintiff was well and duly entitled to a third part of all and every the lands and premises thereby so settled and conveyed as aforesaid, and ought to enjoy the same notwithstanding the defendant's pretended purchase from the

tion, but the deed appears to have been voluntary, and upon which no equitable relief was sought for, but merely to have an account, and to have the estate divided; and no mention is made of the covenant that the *cestui que trust* should enjoy.

In *Sleigh v. Metham* (u), though many objections were taken, it was never suggested that the fact of the trustees being strangers, prevented the deed from operating as a covenant to stand seised. In *Doe v. Smithson* (x), there was the circumstance of one of the covenanters being a stranger. *Hore v. Dix* (y), must be considered as overruled; and is so treated by Mr. Jarman, in his edition of *Bythewood's* Precedents in Conveyancing. But admitting an express covenant to be necessary, that part of the deed by which the grantors undertake and agree to convey and assure the premises for the uses and purposes mentioned in the deed amounts to a covenant. [Parke, B.—That is by way of recital only, and will not raise a use: it is merely executory.] In *Doe v. Williams* (z), it was held that articles in contemplation of marriage by words *in presenti* operated as a covenant to stand seised.

*Cur. adv. vult.*

PARKE, B., delivered the judgment of the Court.—After stating the facts his lordship proceeded.—As we are all of opinion that the deed operated as a covenant to stand seised, it is not necessary to decide whether the evidence of possession ought to have been left to the jury or not; but we by no means wish to be understood as intimating any doubt as to the propriety of the decision of the Court of King's Bench in the case cited; that is in effect, that if the fact of livery of seisin is sought to be inferred from *possession alone*, such possession ought to have existed for twenty years.

The question then is, as to the effect of the settlement.

The rules as to the exposition of deeds, and their operation in a manner different from that intended, are now fully settled, and very distinctly stated in the judgment of Lord Chief Justice Willes, in the two cases of *Doe v. Salkeld* and *Roe v. Trammarr*, and more particularly in the latter. It is there stated that in more recent times the judges have been much more liberal than formerly, and have had more consideration for the substance, the passing of the estate according to the intent of the parties, than the shadow, namely, the manner of passing it. And it is laid down, in respect to covenants to stand seised, that there is no conveyance that admits of such a variety of words; and that it is sufficient if these five things concur:—That there be a deed; words sufficient to make a covenant; that the grantor must be actually seised at the time; that his intent be plain to raise the use; and that there be a proper consideration to raise it.

In the present case all these circumstances are found. There is a deed; the word "grant" is sufficient to make a covenant; the two grantors were

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heir at law of the said John Thorne, the same being with full knowledge and notice of the aforesaid deed of settlement; and therefore doth think fit, and so order and decree, that the defendant, Roger Thorne, from the time of the plaintiff's entry into, and becoming entitled to the aforesaid lands, do account for a third part of the rents before the master.

Commission of partition ordered to issue. Injunction previously granted against committing waste continued.

(u) Luttw. 782.

(x) 2 Wilson, 226, S. C. Willes', 672.

(y) 1 Sid. 25.

(z) 5 B. & Adol. 783.

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both seised; the intent that the husband was to have the use for life is abundantly clear; and the marriage with the daughter is unquestionably a sufficient consideration.

The only objection that can be raised as to the operation of the deed is, not that the intent to raise a use was not plain, but that the intent was to raise that use out of the seisin of the trustees, and not out of that of the grantors; and that *such intent* could not operate, as the trustees could not, it is admitted, take any estate at all: and this objection was grounded on the authority of *Hore v. Dix*, where it was held that a covenant with strangers, that *they* should hold the land to the use of the grantor for life, with remainder to the son, was void. But Lord Chief Justice *Willes* considers this very objection, in the case of *Roe v. Tramarr*, and intimates his dissatisfaction with that decision upon this point. He says that he should have been of another opinion, "because in a covenant to stand seised, the estate properly arises out of the estate of the grantor, and his intent that it should *not*, I think, signifies nothing: for though his intent is to be regarded as to what estate is to pass, and to whom, it is not at all to be regarded as to the manner of passing it, (of which he is supposed to be ignorant); if it were, it would overturn almost all the cases." And though the learned chief justice distinguishes the case then under consideration from that of *Hore v. Dix* and *Samon v. Jones* (a), there can be no doubt, that the learned editor of the valuable edition of *Saunders's Reports* is right in stating, in his note in *Chester v. Willan*, that *Hore v. Dix* and *Samon v. Jones*, are in effect overruled by this decision.

It is true that in most, indeed I believe all, of the cases, there has either been a grant *to the relation*, without the intervention of trustees, or there has been a covenant that the relations should hold and enjoy; but it is clear that the decisions have not proceeded on the ground that one of those were essential. In the cases of *Doe v. Salkeld*, and *Roe v. Tramarr*, in which there was such a covenant, Lord Chief Justice *Willes* mentions its existence, but it is evident he does not rely upon it as necessary to the judgment. And in the case of *Thorne v. Thorne*, Lord Keeper *North* decided expressly, and without difficulty, that the grant to trustees to stand seised to the use of three brothers, in consideration of blood, worked as a covenant to stand seised; and the express covenant that the *cestui qui trust* should enjoy was not taken notice of, and the report is confirmed, as we are informed by Mr. *Wilson*, in the course of the argument, by a reference to the registrar's book. This case is an authority precisely in point, and is so much in unison with the more liberal spirit and sound reason of the more modern decisions on this subject, that we do not hesitate to abide by it.

The rule must therefore be absolute to enter a nonsuit.

Rule accordingly.

(a) 2 Vent. 918.

AUGARDE and others, Assignees of WILLIAM LAST, a  
bankrupt, v. THOMPSON.

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THIS was an action of debt for goods sold and delivered, with counts on an account stated with *Last* before his bankruptcy, and with the plaintiffs as assignees since the bankruptcy. The defendant pleaded *nunquam indebtedness*, and a set-off; and before the plaintiffs replied, became bankrupt. On the following day the plaintiffs' attorney gave the defendant notice, that the plaintiffs had elected to prove under the fiat, in pursuance of the 59th section of the 6th G. 4, c. 16, and that no further proceedings would be taken in the action. Subsequently the defendant ruled the plaintiffs to reply, upon which they applied to the Court, and obtained a rule to stay proceedings, upon the terms of 59th section of the Bankrupt Act.

Where a defendant has become bankrupt, the plaintiff must either prove his debt, or have his claim entered on the proceedings under the commission, to entitle him to discontinue his action, under the 59th section of the 6th G. 4, c. 16.

*Crowder*, in *Hilary* Term, obtained a rule calling on the plaintiffs to shew cause why the defendant should not be at liberty to sign judgment, and why a rule to stay proceedings should not be rescinded. His affidavit stated amongst other things, that *Last* and the defendant had been examined before commissioner of bankrupts, when *Last* stated that the defendant had a set-off against the claim for which the action was brought, upon which there was balance due to the defendant, and in consequence the commissioner refused to allow the plaintiff to prove any debt.

*Platt* and *Hughes* shewed cause.—The question turns upon the construction of the 59th section of the 6th G. 4, c. 16, which enacts "that no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election of such creditor to take the benefit of such commission, with respect to the debt so proved or claimed." As the act of *claiming* under the commission operates as a discontinuance, the Court will not give judgment against the plaintiffs for want of a replication, when they have no power to go on with the action. In *Ex-parte Woolley* (a), where the creditors' claim had been rejected by the commissioners on the ground that before he was admitted to prove, he ought to have produced the rule of discontinuance in the action, the lord chancellor said, "If the creditor discontinues, he does it under the certainty whether his claim will be admitted or not; while on the other hand, by the act of parliament, the proof or claim in itself operates as a discontinuance." It is true, that in *Kemp v. Potter* (b), it was held that the bankrupt was entitled to have some entry or suggestion on the record of the plaintiff's election. That would have done in the present case if the defendant had required it. It was clearly the intention of the legislature that the protection should be mutual.

(a) 1 Rose, B. C. 394.

(b) 6 Taunt. 594.

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*Crowder*, in support of the rule.—The object of the clause is to prevent the creditor having two remedies at the same time. [Lord *Abinger*, C. B.—The statute says, the proving or *claiming* a debt shall be deemed an election to take the benefit of the commission.] It is submitted that it is not sufficient merely to demand a debt; there must be a specific claim or some entry on the proceedings under the commission. Suppose a party brought a frivolous action, and after the defendant became bankrupt, wished to prove under the commission, but was refused by the commissioners, is he to be released from the costs by making a claim for which there was no foundation? [*Parke*, B.—In *Ex-parte Frith* (a), it was held, that a party tendering the proof or claim of a debt under a commission, is entitled to the judgment of the commissioners upon his right to prove a claim, before he relinquishes his action.]

*Cur. adv. vult.*

Lord *ABINGER*, C. B.—The question in this case was, whether the plaintiff can be said to have elected to prove his debt under the commission, within the meaning of the 59th section of the Bankrupt Act; and some doubt was entertained as to the construction of the statute. We are of opinion that a plaintiff cannot apply to the Court to discontinue his action against a bankrupt unless he has either proved his debt, or had his claim entered on the proceedings under the commission. The words are—That no bankrupt who has brought any action, &c. in respect of any demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, *or have any claim entered on the proceedings under such commission*, without relinquishing such action or suit; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed.” Under these words of the statute, we are of opinion the plaintiff cannot discontinue, unless he has either proved a debt, or had his claim entered. In the present case he has done neither. We think there is no injustice in saying that he cannot have the privilege of discontinuing the action without payment of costs, unless he has adopted one or the other of those courses. That part of the rule which prays that the defendant may be at liberty to sign judgment must be discharged, but the order to stay the proceedings must be rescinded.

Rule accordingly.

(a) 1 Glyn. & J. 165.

### JONES v. TURNBULL.

The plaintiff sued for work done by him whilst an uncertificated bankrupt. The cause was ultimately referred, and the arbitrators found a sum due to the plaintiff:—*Held*, that the attorney of the plaintiff was entitled to the amount of his lien for costs as against the assignees.

THIS was an interpleader rule, calling on the assignees of the plaintiff to support their claim to the money for which the action was brought. The plaintiff, who was a builder, became a bankrupt in *July*, 1835, and had not yet obtained his certificate. In *October*, 1836, he commenced an action against the defendant for a balance due to him for repairs. At the trial the plaintiff was nonsuited, it appearing that the credit had not then expired. It was,

*Held*, that the attorney of the plaintiff was entitled to the amount of his lien for costs as against the assignees.

however, agreed to refer the cause, and the arbitrator found 124*l.* due to the plaintiff, after deducting the costs of the nonsuit. This money was claimed by the plaintiff's assignees. The plaintiff's attorney, also, put in a claim for the costs of the action and of the reference, and for 40*l.*, money lent to the plaintiff to enable him to do the work for which the action was brought.

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*Chandless*, for the assignees.—This is a debt to which the assignees are entitled. In *Crofton v. Poole* (a), the plaintiff, a furniture broker and uncertificated bankrupt, was employed by defendant to remove his goods, in the course of which business he employed several men and vans, supplied packing cases, repaired furniture, and provided materials for this purpose, and other articles to a trifling amount; and it was held that the debt which thereby accrued to the plaintiff was not in respect of personal labour, but was claimable by assignees. If it is intended to engraft any exception to the general title of the assignees, it is for the other side to shew it. [*Parke*, B.—Would the attorney have had a lien as against the plaintiff? He swears he did not allow the plaintiff to be an uncertificated bankrupt.] The case must be tried by the same principle as if the assignees had sued the defendant, in which case he could not have pleaded the lien of the plaintiff's attorney. [*Lord Abinger*, C. B.—No; but the attorney would be in possession of the award, and might refuse to let the assignees have it for the purpose of their action, unless he was paid the amount of his lien. *Parke*, B.—Suppose the bankrupt himself had sued, the original claim for work and materials would merge in the award, and he must have discharged the attorney's lien or order to get the award: you stand in the same situation.]

*Kelly* appeared for the plaintiff, and *Platt* for the defendant.

LORD ABINGER, C. B.—The Court are disposed to think the attorney entitled to his lien for the costs of the action and of the reference. The attorney was employed by the plaintiff while the assignees stood aloof, and they now claim the benefit of his services. It must be referred to the master to ascertain the amount of the attorney's claim, and he is to have the costs of the action and of the reference, but not the 40*l.* lent: the surplus to be paid into court.

Rule accordingly.

(a) 1 B. & Adol., 558.

### SMITH v. ANDREWS.

*W. H. WATSON* moved for a rule to shew cause why the plaintiff or his attorney should not refund to the warden of *Dover Castle* the sum of 9*l.* 9*s.* 2*d.*, paid in lieu of an attachment. It appeared that the defendant

A writ of *capias* was directed to the warden of *Dover Castle*, upon which he returned *cepi corpus*. A body rule afterwards issued, which expired on the 28th of *November*. On the 6th of *December* the defendant gave notice of justifying bail at chambers, which notice was returned, the plaintiff saying the warden was fixed. On the 17th, another notice was given, which was also returned; but on a subsequent day the plaintiff's attorney attended at chambers, protested against the irregularity of the proceedings, and took objections to the bail, which were overruled, and the bail justified:—*Held*, that the opposing the bail at chambers was no waiver of the plaintiff's right to an attachment for not bringing in the body.



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was arrested on the 8th of *November*, and on the 10th executed a bail-bond. On the 15th the warden was ordered to return the writ, when he accordingly returned *cepi corpus*, and on the 22d a body rule issued, returnable on the 28th. On the 6th of *December*, the plaintiff's attorney was served with a notice of bail having been put in and filed, and that they would justify by affidavit at chambers. The plaintiff's attorney returned these notices, stating that the body rule had long since expired, and that the warden was fixed. A subsequent notice was given on the 17th, which was also returned as irregular. However, on the 23d, the plaintiff's attorney attended at the judge's chambers, when the bail were rejected on account of the notices being irregular. Subsequently, notice of justification was given for the 5th of *January*, on which day the plaintiff's attorney attended, and protested against the irregularity of the proceedings, and also took several objections to the bail, which were overruled by the learned judge, and the bail justified. On the 17th of *January*, application was made to the warden for payment of the debt and costs, and a bill of costs was delivered, which did not contain any items for attending and opposing the bail at chambers, nor was the warden informed that the bail had justified. The money was paid by the warden under a threat of attachment.

*Kelly* shewed cause.—At the time the plaintiff received the money he was in a condition to apply for an attachment. By the practice of the Court, the justification of bail was a mere nullity. The body rule having expired on the 28th of *November*, on the following day the warden was in contempt, and the plaintiff might have moved on the first day of *Hilary* Term for an attachment. Supposing the justification of bail a nullity, no act of the plaintiff could defeat his right to the attachment. Attending and opposing the bail was no waiver, as the plaintiff protested against the irregularity of the proceedings. *Hawkins v. Plomer* (a), *Holt v. Meddowcroft* (b). The defendant had no power to put in bail in vacation, neither could the warden purge his contempt, except by consent. *Sayers v. Tolfree* (c).

*W. H. Watson* in support of the rule.—The plaintiff was not in a condition to move an attachment on the first day of *Hilary* Term. Here there was no order, but a rule to bring in the body; the case stands therefore on the old practice, under which it has been held, that if bail be put in, or the defendant rendered at any time before an attachment is moved for, it is irregular to move. *Rex v. the Sheriff of Middlesex* (d). The rule of *Hilary* Term, 3 Will. 4, applies only to an order to bring in the body. If the bill of costs had contained items for attending and opposing bail, it is most probable that the warden would not have paid the money.

PARKER, B.—I am of opinion that the plaintiff was in a condition to move on the first day of *Hilary* Term for an attachment against the warden, and also think, if all the facts had been disclosed, that the warden's agent would not have paid the money; and if an attachment had issued, would have moved to set it aside on payment of costs. By not inserting in the bill of costs charges for attending and opposing bail, the warden has been misled. The rule cannot

(a) 2 W. Black. 1164.  
(b) 4 M. & Sel. 467.

(c) 1 Price, 2.  
(d) 2 M. & Sel. 562.

be granted on the terms prayed for, but must be suspended, in order to enable the defendant or his bail to apply to stay proceedings. If no such application be made, the plaintiff's attorney must receive his costs, to be taxed by the master, and refund the residue to the warden.

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### LAIDLER v. BURLINSON.

**T**ROVER for one-fourth part of a ship. *Pleas*—first, not guilty; secondly, that the plaintiff was not possessed as of his own property of the said one-fourth part of the ship; and lastly, that one *J. Laing* became a bankrupt, and the defendant was his assignee, and that at the time of the bankruptcy the ship was in the possession, order, and disposition of *J. Laing*, as reputed owner, by consent of the true owner. The plaintiff joined issue on the two first pleas, and to the last replied, that the ship was not by the consent and permission of the plaintiff, as true owner thereof, in the possession, order, or disposition of the said *J. Laing* as reputed owner: upon which issue was joined. At the trial before Lord Denman, C. J., at the spring assizes for *Northumberland*, 1836, a verdict was found for the plaintiff for 200*l.*, subject to the opinion of the Court upon the following case.

In the year 1833, and until the time of his bankruptcy, *J. Laing* carried on business as a ship-builder at *Middlesborough*, in the county of *York*. An agreement, signed by *J. Laing* and the plaintiff and the other parties whose names purport to be signed thereto, was produced in evidence at the trial, which was as follows:—

“*Middlesborough*, 10th June, 1833.

“Particulars of build and description of a new ship, now about one-third built, in the yard of *J. Laing*. Length of keel aground, 75 ft. 6 in.; rake forward, 7 ft.; rake of post, 1 ft. 6 in.; extreme breadth, 24 ft. 4 in., &c. &c. (describing the other parts of the ship). To have 11 H beams and 15 deck beams, fastened with wood or iron lodging knees; to have five hooks forward, and have sufficient coaming, windlass, bits, catheads, rudder, capstan, boats, checkers, hatches, bulkheads; and the hull to be completed in every respect, with carpentry, joiner, blacksmith, turner, painter, and plumber work, long boat and skiff, and to be fitted out with all spars, masts, cordage, chains, anchors, cooper stores, and every other stores sufficient and as usual in the coal trade, and ready to take in a cargo of coals, without any extra whatever, and to be launched in the early part of *September* next. Two chain cables, 85 fathoms each; one chain hawser, 60 fathoms; hempen, tow-line, and two warps, a spare topsail, foresail, and foretopmast staysail; the pant-strokes to be English oak; for the sum of 1,750*l.*, and payment as follows, opposite to each respective name.” This agreement was signed by *James Laing*, and after his signature followed these words:—“We, the undersigned, hereby

*J. L.* carried on the business of a ship-builder, when an agreement was entered into, headed, “Particulars of build and description of a new ship, now about one-third built, in the yard of *J. L.*,” then followed a full description of the dimensions and other particulars of the vessel, “for the sum of 1,750*l.*, and payment as follows, opposite each name.” After the signature of *J. L.* followed these words, “We, the undersigned, hereby engage to take shares in the before-mentioned vessel as set opposite to our respective names, and also the mode of payment.” Then followed the signatures of different persons, and amongst them that of the plaintiff for one-fourth. After the plaintiff signed, *J. L.* proceeded with the building of the vessel, and one *H.*, who had signed on behalf of a company, occasionally superintended the work. The plaintiff paid for his share, and afterwards, and before the vessel was completed, *J. L.* became bankrupt, and the defendant was appointed his assignee:—*Held*, that no property in the vessel passed to the plaintiff.

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engage to take shares in the before-mentioned vessel as set opposite to our respective names, and also the mode of payment :

" *Tees Coal Company*, payment for one- { 6 mo. 29, Bill 200*l.* 0*s.* 0*d.*  
 fourth. { 7 mo. 12, Cash 233*l.* 2*s.* 11.

" *James Laing.*

" *John Atkinson*, one-eighth ; payment in rope and canvas.

" *Thomas Laidler*, one-fourth.

" *William B. Earle*, one-eighth.

" *William Fairbridge*, one-sixteenth ; cash, 55*l.*, *July 25, 1833.*

" *Philip and Joseph Heselton*, one-eighth.

" *Anthony Harris*, for one-sixteenth, cash and goods, } *James Laing.*  
 103*l.* 15*s.* 9*d.* ; 12 mo. 5. 1833.

" *Middleborough*, 14 *July, 1833.* I hereby agree to accept the above price and mode of payment.

" *James Laing.*"

In the month of *October, 1833*, the plaintiff entered into and signed the above agreement. *Wm. B. Earle, Fairbridge*, and *P. and J. Heselton*, afterwards, and before the act of bankruptcy, at separate times entered into and signed the agreement. *Anthony Harris*, whose name appears last as a party subscribing to it, on the 18th *January, 1834*, (and not before, although it purports to bear date in *December*,) the day after *James Laing* committed the act of bankruptcy on which the fiat hereinafter mentioned was founded, entered into and signed the agreement in question. It is to be taken for the purpose of this case, that whatever might be the effect of the agreement as to the passing of the property in the respective shares to the several parties, at all events one-sixteenth, which *A. Harris* agreed to buy, did not pass to him, but became vested in the defendant, as assignee of *James Laing* under the bankruptcy. In order to prove payment by the plaintiff to *Laing* for his proportion of the ship, he gave in evidence the following facts, *viz.*, that in the month of *June, 1833*, he had accepted a bill for 30*l.*, drawn by *Laing* upon him, and which was paid by him when due ; also, that another bill, dated 29th *October, 1833*, was drawn by *Laing* upon and accepted by the plaintiff, for 293*l.* 6*s.* 8*d.* ; and he then proved that on the 5th of *December, 1833*, timber to the amount in value of 129*l.* 12*s.* 9½*d.* was supplied by him to *Laing*, which was expressly agreed, at the time of the supply, to be taken in part payment for the said vessel.

In the month of *June, 1833*, the said *James Laing* had the ship, in respect of which this action is brought, about one-third built, and in his ship-yard, and he had at that time no other ship upon the stocks, and from that time until the bankruptcy of *James Laing* he proceeded with the building of this ship, and after the signature of the plaintiff to this agreement expended large sums of money in and about the building it. The *Tees Coal Company*, whose signature appears to the agreement, consisted at that time of two persons, *Taylor and Harris*. *Harris* used to go and look at the vessel when building, and occasionally found fault with the work, which was improved in consequence, and the bankrupt had told his foreman to act under *Harris's* direction. On the 17th *January, 1834*, *Laing* committed an act of bankruptcy, and on the 25th of the same month a fiat issued thereon against him, under which he was adjudged a bankrupt, and the defendant was duly appointed assignee of his

estate and effects. At the time of the bankruptcy the frame of the said vessel was on the stocks in *Laing's* building-yard, in an unfinished state; and after the bankruptcy, some men continued to work and receive their money from *Harris*.

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The messenger under the *fiat* seized and took possession of the ship in the building-yard of *James Laing*.

The vessel was ultimately completed.

To prove a conversion by the defendant of the ship in question, the plaintiff's attorney proved that, on the 24th of *January*, 1835, he, on the part of the plaintiff, made a demand of the vessel on the defendant, who answered that he had sold it for 970*l.* or 980*l.* to a person named *Metcalfe*, who, at the time of the demand, and at the time of the commencement of this action, had possession of it. The vessel, at the time of the bankruptcy, was not in the possession, order, or disposition of the bankrupt as reputed owner thereof.

The first question for the opinion of the Court is, whether or not the property in one-fourth of the vessel passed to the plaintiff under the above circumstances; if not, a verdict to be entered for the defendant. If the Court shall be of opinion that the property passed, but that the defendant had not been guilty of a conversion, then a nonsuit to be entered; but if the property passed, and the defendant had been guilty of a conversion, then a verdict for the plaintiff for 200*l.* It is to be taken as a fact, that if the property in one-fourth passed to the plaintiff, the defendant was tenant in common of the vessel with the plaintiff.

*S. Temple*, for the plaintiff.—The first question is, whether by this agreement the property in one-fourth of the ship vested in the plaintiff. The general rule is, that where an artisan, directed to make an article not in being, prepares to execute the order, and has power to deliver that specific article or some other coming within the terms of the contract, no property passes until the chattel is delivered; but if, at the time of the contract, there is an article in being, the property at once vests in the purchaser. In *Mucklow v. Mengles* (a), the bankrupt had undertaken to build a barge, and before the work was begun, money was paid to him on account. When the barge was finished, the purchaser's name was painted on the stern. Before the commission of bankrupt issued, the barge was seized by the defendant under an execution; and it was held that the property in the barge did not pass to the purchaser. *Heath, J.*, there says, that "if the thing be in existence at the time of the order, the property of it passes by the contract; but not so where the subject is to be made." This decision was recognized in *Woods v. Russell* (b), where *Abbott, C. J.*, in delivering judgment, says, "This ship is built upon a special contract, and it is part of the terms of the contract that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, and part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that as between him and the builder he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." It is true that this judgment is somewhat

(a) 1 Taunt. 318.

(b) B. & Ald. 942.

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qualified in *Clark v. Spence* (c), but that authority does not affect the decision of *Woods v. Russell*, as applicable to the present case; for here contract was for a specific vessel, one-third built, and no instalments were from time to time to be paid, but the whole purchase-money. In *Woods v. Russell*, the bankrupt signed the usual certificate, and the ship was registered in the name of the purchaser; which facts are adverted to by *Abbott, C. J.*, who says, "but this case does not depend merely upon the payment of the instalments, so that we are not called upon to decide how far that payment vests the property in the defendant, because here *Paton* signed the certificate, to enable the defendant to have the ship registered in his, the defendant's, name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner; and when *Paton* concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as the oath described it to be?" There the signing the certificate is not made use of for the purpose of showing a delivery, but that by that fact the bankrupt testified that the ownership had gone from him and had vested in the purchaser. In the present case the bankrupt, by his agreement to accept the contract and the mode of payment, in effect testifies that the ownership had gone from him. [Lord *Abinger, C. B.*—In *Clarke v. Spence*, the ship was to be built under the superintendence of an agent of the purchaser.] Here the building of the vessel has been superintended by *Harris*, who must be considered as the superintendent on behalf of the other purchasers.

Secondly, it is contended that this is an action by one tenant in common against another, and cannot be maintained; but such defence is not available upon this record. The plea of not guilty only puts in issue the conversion in fact; and if the defendant meant to justify his right as tenant in common, he should have pleaded that matter specially. *Stancliffe v. Hardwicke* (d).

*W. H. Watson, contra.*—Under this agreement no property in the vessel would pass until its completion. The contract is a sort of "prospectus" of a ship, and of the mode in which the bankrupt would ultimately complete it. It does not purport to be the sale of one-third part of a ship, but is merely an agreement to sell a specific vessel when completed. If the builder did not finish the ship, the remedy would be by action for breach of contract. The terms of the agreement are,—“We, the undersigned, hereby agree to take shares in the beforementioned vessel, as set opposite to our respective names, and also the mode of payment. That is not that we agree to buy at that moment, but to take shares in the vessel when completed. The parties signed at different periods. It is stated that *Harris* from time to time inspected the building of the vessel; but no inference can be drawn from that fact; it is only like a person going to see the progress of a carriage which he has ordered. It is clear that if the specific article be ready for delivery, the property will pass; but if it be incomplete, and incapable of delivery at the time of the contract, no property passes until it is finished. *Clarke v. Spence* was decided upon the ground that the property passed by implication; for there

the ship was to be paid for at certain stages, and a person was to superintend the building of it on the part of the purchaser, so that each individual plank, as used in the progress of its completion, was delivered by the builder, and accepted by the purchaser. The judges in that case lay down the principle of law, "That, in general, under a contract for building a vessel, or making any other thing not existing in specie at the time of the contract, no property vests in the party, whom, for distinction, we will call the purchaser, during the progress of the work, nor until the vessel or thing is finished and delivered, or at least ready for delivery and approved by the purchaser; and that even when the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days. *Goode v. Langley (a)* is an authority in favour of the present argument; for though the Court decided that case on the ground that the sheriff could not make a second seizure of the same goods, yet they might without difficulty have disposed of it by saying the property in the chattel vested in the purchaser, if they had been of that opinion. In *Atkinson v. Bell (b)*, *Bayley, J.*, says, "When goods are ordered to be made, while they are in progress, the materials belong to the maker. The property does not vest in the party who gave the order, until the thing ordered is complete; and although while the goods are in progress, the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are so delivered." So here all that appears is an intention that the ship in question should be delivered when finished. Supposing the builder had died before the vessel was finished, and his executors had no assets, if the argument on the other side is good for any thing, the purchaser would be entitled to the hull without paying any part of the price; or supposing both parties died without assets, to whom would the unfinished vessel pass? There is this further difficulty,—the contract is by five or six persons to take shares; who is to say whether the vessel is built according to the contract? The money is to be paid, by the terms of the contract, according to the shares set opposite their respective names. It is obvious, then, that payment and delivery would be cotemporaneous.

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*Temple*, in reply.—The whole document must be looked at, for the purpose of seeing whether there was an intention that the property should vest in the purchasers. Suppose the expression had been, "we hereby agree to buy the vessel in the proportions following," that would be an agreement for the purchase, to take effect at that particular moment. The expression used is substantially the same. According to *Woods v. Russell*, and *Clurke v. Spence*, there has been an appropriation by payment. [*Parke, B.*—No; here there is not an actual payment, but a contract to pay.] From the moment of signing the agreement, the property vested in the different purchasers. The agreement describes the vessel on a particular day, and it is the same chattel six months afterwards, though more work was then done to it. The vendor signs but once, and after all the other parties have entered into the contract. The signature of the bankrupt is evidence that he then intended the property to vest in the

(a) 7 B. &amp; C. 26.

(b) 8 B. &amp; C. 277, S. C. 2 Moo. &amp; R. 292.

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purchasers; and if they themselves had thought the agreement was not to take effect until the vessel was completed, it is clear they would not have paid any portion of the money until that time.

LORD ABINGER, C. B.—It seems to me there is no occasion to qualify the doctrine laid down in *Woods v. Russell* or *Clarke v. Spence*. In those cases this principle was established,—that a man may contract to purchase a ship as it is being built; and there the particular terms of the contract implied that it was to be of that character: a person was appointed by the purchaser to superintend and determine in what manner the vessel should be built, and the money was paid at different stages; and the Court held those facts evidence of the intention of the parties making the contract, that the vendees should become proprietors of the ship as she was built, so that the first sum paid upon the first stage of building vested the property in them. Suppose the builder had died after the first payment, according to those decisions, the ship in its then state would be the property of the purchaser, and not of the executors. There is no doubt a man may agree either to purchase a ship when finished, or as she then stands. The question then is, what sort of contract is this? Is it a contract which vests the property in the purchaser immediately, or merely a contract that the vessel shall become his when finished? It appears to me of the latter description. If it had been a contract to purchase the ship one-third built, it is natural to suppose there would have been a specific sum appropriated. The agreement includes goods, cables, &c., which do not form part of the ship, for the whole of which 1700*l.* is to be paid. Is not this, then, an agreement to purchase the ship when finished for 1700*l.*, in such proportions as are affixed to each person's name? It is clearly an entire contract to purchase a complete ship, and no part of the price is payable until it is completed.

PARKE, B.—I concur in opinion with the lord chief baron. The whole question is as to the construction of the contract. Was it a bargain and sale of a material then lying in the yard of the builder?—for, if so, no doubt the property passed. I think it to be completely settled, that if there be a bargain and sale of a specific chattel, for a valuable consideration, though it is not delivered, the property passes in point of law, and an action may be maintained for the non-delivery, or in trover. *Sheppard's Touchstone* (c), *Langfort v. Tyler* (d). On the other hand, it is equally clear that in an executory contract the property does not pass. A contract may be either to make an article of a particular sort, in which case the workman may perform his part of the contract by the delivery of any chattel corresponding with the order; or it may be of such a nature that the specific article must be delivered. The question is, to which of these classes the present contract belongs?—certainly not to the second: the bankrupt was bound to make a chattel not then existing as a ship, and there was no bargain and sale of a specific material. The agreement begins by stating the several particulars, and then it concludes, "We the undersigned agree to take shares in the before-mentioned vessel." The plaintiff is a purchaser of one-fourth. It is clear he was to pay the stipulated portion, not for the materials as they stood, but for the materials when others were added, and when complete as a ship, and delivered. The principle most resembles *Mucklow v. Mangles*.

(c) P. 224, 225.

(d) 1 Salkeld, 113.

*Woods v. Russell* and *Clarke v. Spence* are distinguishable; for, in the present case there is no sum that can be considered as the price of the material in its then existing state. In *Woods v. Russell* there were three ingredients on which the judgment of the Court was founded: first, it was stipulated that the price should be paid by instalments, from which the Court inferred an intention to appropriate the work as it proceeded; secondly, a superintendant was employed; and thirdly, a certificate of registry when the work was completed. If there had only been one of those circumstances, viz., that part of the money was to be paid by way of instalment, I should have joined in the decision. In *Clarke v. Spence*, the Court considered the payment by instalments as evidence of an intention to appropriate the work as the instalments paid. But here there is nothing that can by any possibility be considered as an intention to purchase the ship; the stipulation is for one entire price to be paid when the ship is completed, and until then no property passes.

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BOLLAND, B.—I think with the rest of the Court. In *Woods v. Russell*, and *Clarke v. Spence*, there was a contract for a specific thing then in existence. In the present contract there is nothing from which any intention can be inferred to purchase the vessel otherwise than when completed.

ALDERSON, B.—The principle is well laid down, that in order to vest the property under a contract, the identical goods must be ascertained, and the price fixed. The question is, what specific goods are the subject of the present contract? If one-third of a ship, that would vest; but if a ship when completed, the defendant is entitled to judgment. It seems to me that the contract was for the sale of a ship when completed, at a certain price. *Woods v. Russell* determined that when a ship was to be paid for by way of instalment, that was a contract for a specific part of a ship existing at the particular time the payment was made. Whether or no that was a sound construction is a question upon which I entertain great doubt; but where a construction has been put upon a contract, and parties afterwards use the same words as in *Clarke v. Spence*, it would be a monstrous proposition to say that the latter terms should not be construed in the same manner as the former.

Judgment for the defendant.

### MAGEE v. ATKINSON and another.

THIS was an action of assumpsit for the breach of an agreement to deliver fifty *Great Western Railway* shares. The declaration, in addition to the special count, contained the money counts and a count on an account stated.

T., a broker in  
Liverpool,  
having been  
employed by  
J. to sell certain

railway shares, agreed to sell them to S., who was M.'s broker. T.'s clerk, by mistake, entered the sale in T.'s book in the name of T. as vendor, and sent a contract-note to S.'s office containing the same error. T. shortly afterwards discovered the mistake, which he corrected by entering the name of J. in the book as vendor, and he also sent a note containing the correction to the office of S. on the same evening. Both notes were seen for the first time on the following day together by S. The first note was not demanded by T. on delivery of the second to S., neither did S. return it. An action having been brought by M. against T. for breach of his contract in not delivering the shares, the judge at the trial directed the jury that the defendant, having signed the contract in his own name, was liable to the plaintiff, although he was known to be only a broker. Evidence was tendered of a custom at L. not to insert the principal's name in the broker's note, but was rejected by the learned judge. The jury found a verdict for the plaintiff. A motion having been made for a new trial, on the ground of misdirection and of the rejection of evidence, *held*, that the direction of the learned judge was correct, and that the evidence of the usage was properly rejected.



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*Pleas*—1st, Non-assumpsit; 2nd, to the first count, that the defendants did not sell the shares *modo et formâ*; 3rd, to the first count, that the plaintiff was not willing to pay for the shares. The point in the case arose upon the second plea, viz. whether it was the defendants or other persons sold the shares to the plaintiffs.

At the trial, before *Patteson, J.*, at the *Liverpool* spring assizes, it appeared, that the defendants were sharebrokers in *Liverpool*. On the first of *December*, 1836, a person of the name of *Scoles*, who was the plaintiff's broker, received an order from him to buy the fifty shares in question. *Scoles* met *Townley*, and agreed to purchase the shares from him. These shares belonged to a *Mr. Jacob*, from whom *Townley* had received authority to sell them. Immediately after the sale to *Scoles*, *Townley* went to his office, and told his clerk that he had sold fifty *Great Western* shares to *Scoles*. One of the clerks entered the sale in the books as a sale by *Townley* to *Scoles*, and directed another clerk to make a copy of the entry, and to take it over to *Scoles*. *Townley* shortly after returned to the office, and stated that he had sold fifty other shares to another person; at the same time he looked at the book, and told the clerk he had mistaken, and that the entry ought to have been in the name of *Jacob*, as vendor, and not of defendant. Upon this he altered the entry in the book, and caused a new note, containing the correction, to be sent to *Scoles*. There was some doubt as to whether the latter note was taken the same evening; there was none, however, that they were not seen by *Scoles* until the following morning, and at the same time. The defendant's clerk, when the first note was delivered, did not demand the second. Evidence was tendered, at the trial, of a custom in *Liverpool*, to send in a broker's note without the principal's name being inserted therein; as also of *Jacob* being known as a dealer in shares. The learned judge refused the evidence, and directed the jury, first, to say whether the second note was in substitution of the first; and, secondly, told them that, in point of law, even though the defendants were known as brokers, still, if they signed a contract in their own names, they were liable. A verdict was found for the plaintiff, damages 350*l*.

*Alexander* now moved for a new trial, on the ground of misdirection, and also on account of the rejection of evidence; and contended, that the evidence of the usage ought to have been left to the jury; who, if they found the usage, would infer, as a necessary consequence, that *Scoles*, as a broker, would be conversant with such usage, and would know that the defendants, being also brokers, dealt not on their own account, but on behalf of some principal; and cited *Wilson v. Hart (a)*. He also relied on the circumstance that the second note was, to all intents, a new contract, as *Scoles*, having seen both notes at the same time, could not have dealt with the first so as to prejudice any party.

**PARKE, B.**—I do not see any failure on the part of the judge. There can be no doubt that, as the defendants signed the note, they are personally liable. The question for the jury was, whether the second note was a substituted contract. The jury have found that question in the negative. No doubt, when the principal was discovered, the plaintiff, if he had chosen, might have

(a) 7 Taunt. 295; 1 Moore, 45, S. C.

sued him. That, however, is no reason why he shall be precluded from suing the defendants, who by their signature have made themselves liable. If they had taken back the first note, this difficulty would never have arisen. The admission of the evidence of the custom would have been admitting parol evidence to alter the written contract.

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The rest of the Court concurring.

Rule refused.

### HARRIS v. BUTLER.

**CASE.** The first count of the declaration stated that one *Matilda Harris*, then being the daughter and servant of the plaintiff, with the consent of the plaintiff, became and was the apprentice of one *Adeliza*, the wife of the defendant, for the purpose of learning the business of a milliner, in consideration of the sum of 29*l.* then paid by the plaintiff to the defendant in that behalf, and on the terms that the said *Adeliza*, with the consent of the defendant, should provide the said *Matilda* with meat, drink, and lodging. Nevertheless, the defendant, intending, &c., whilst the said *Matilda* was such apprentice, debauched her, whereby she became ill, and incapable of serving the said *Adeliza* as such apprentice, or of learning the said business; and thereby the plaintiff lost the benefit he ought to have derived from the money so paid as aforesaid, and from the said *Matilda* being instructed in the said business, and hath laid out a large sum of money about her cure.

A declaration in case for seduction of the plaintiff's daughter by the defendant, (the daughter being an apprentice to the wife of the defendant,) is bad on special demurrer, as not shewing a loss of service, or any contract, express or implied, on the part of the defendant, to take care of the daughter's morals.

Second count—That plaintiff, at the request of the defendant, suffered the said *Matilda*, then being the daughter and servant of the plaintiff, and an infant, to wit, of the age of sixteen years, and accustomed to be employed by the plaintiff, to go and reside in the house of the defendant, to be furnished with board and lodging there, for the purpose of being taught the business of a milliner by the said *Adeliza*, for a certain consideration then paid by plaintiff to defendant; and thereupon it became and was the duty of the defendant to take due and proper care of the said *Matilda*, and of her morals and health, whilst she should reside in the house of the defendant, so that the plaintiff might not be injured and prejudiced by reason of the improper treatment by the defendant of the said *Matilda*. Nevertheless, the defendant, &c. (as in the first count.

*Plea*—To each of the counts, that the said *Matilda*, at the said times when, &c., was not the servant of the plaintiff.

*Special Demurrer* to both pleas.

*Hughes*, in support of the demurrer.—This is not a common action of trespass *per quod servitium amisit*; it is a special action on the case, founded on a contract. The consideration here stated is a good consideration for the promise of the defendant. [*Parke, B.*—You ought to have declared in assumpsit, to shew the defendant's liability. Can you make out that there is a special contract by the defendant?] The second count clearly shews such a contract on his part, and that by his wrongful act the plaintiff has been injured, inasmuch as he has lost the benefit he contemplated. Besides, the daughter has

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been sent home, and the providing with necessaries, which was part of the defendant's contract, has been thrown on the plaintiff by the wrongful act of the defendant. The judgment of *Bailey, J.*, in *Hall v. Hollander* (a) suggests the adoption of the present form of action, founded on the expenses necessarily incurred by a father where his child was of such tender age as to be incapable of performing any service. So, in like manner, here, this being a special action founded on its own peculiar circumstances, there is no necessity of proving any loss of service, as in the case of trespass *per quod servitium amisit*, in which latter form of action the loss of service forms its very essence. In *Dean v. Peel* (b), *Wilson, J.*, cites two cases to shew that if the infant is under twenty-one years of age, her father may maintain an action for her seduction, even if she be residing under another's roof; and in *Speight v. Oliveira* (c) it was held, that a father might recover damages for the seduction of his daughter, although, at the time of the seduction, she was servant to the defendant. [Lord *Abinger, C. B.*—*Carr v. Clark* (d) and all the cases go on this ground, that the relation of master and servant must be shewn. *Parke, B.*—*Speight v. Oliveira* was a case in which the defendant colourably hired the daughter with a view of destroying the relation of master and servant between her and her father; and it was held, that the fraud of the defendant excluded such a defence. So in the cases cited: in *Peel v. Dean* there was an *animus revertendi* on the part of the daughter. Originally it was necessary for the party bringing an action of trespass *per quod servitium amisit* to shew some act of service by the daughter. However, *Littledale, J.*, in *Maunder v. Venn* (e), has held, that it is sufficient if the daughter lived in the father's family under such circumstances that he had a right to her services; and this may now be considered the rule on the subject. On your first count you are clearly out of court; on the second, you must shew that there was a contract between the plaintiff and defendant to oblige the latter to take care of the daughter's morals. Lord *Abinger, C. B.*—Does the law imply in this case a contract by the defendant to take care of this female's morals? Suppose a man takes a lodging for his son and daughter, including their board, does the lodging-house keeper contract to take care of their morals?] In this case the defendant by his act deprives the plaintiff of the benefit of the sum of money he has paid. It is averred that she was sent home and deprived of learning the trade. [*Parke, B.*—You have not, by your first count, raised the fact that she was to reside in his house; and although the duty of taking care of the daughter's morals may arise out of the contract of apprenticeship, you have not stated on the face of your declaration any such contract, or shewn circumstances from which a contract may be implied.]

Lord *ABINGER, C. B.*—If the declaration can be amended, so as to raise the question of an express or implied contract on the part of the defendant to take care of the daughter's morals, you may do so; if not amended within a week, judgment will be for the defendant.

Judgment accordingly.

*R. V. Richards* was to have argued on the other side.

(a) 4 Barn. & Cress. 660; 7 D. & R. 133,  
 S. C.  
 (b) 5 East, 45.

(c) 2 Stark. Rep. 493.  
 (d) 2 Chit. 260.  
 (e) 1 Moo. & Mal. 323.

## LEACH v. THOMAS.

Eschequer.  


**A**SSUMPSIT.—The declaration stated, that whereas, theretofore, to wit, on the 23d day of *May*, A. D. 1832, the defendant being about to quit at *Michaelmas* then next, a certain farm which he the defendant held of the plaintiff, thereupon by a certain agreement then made between the plaintiff and defendant, the plaintiff undertook to see the defendant paid by the incoming-tenant of the said farm, for dressing the fallow, 5*s.* an acre for the first ploughing, and 3*s.* an acre for every other ploughing, and after a certain rate, to wit, 2*s.* an acre for dragging the same; and it was thereby also agreed, that the defendant should be paid for the grass-seed sown in the ground of the said farm that year, and 1*s.* a load for dung when driven on the land; and that if the incoming-tenant should wish to purchase the clover-hay, or any meadow-hay, each person should fix on a person to value the same; and if the person so fixed on should not agree on the value, a third person should be called in who should finally fix the value of the same; and that the incoming-tenant should purchase the corn at a fair valuation, as by the said agreement, reference being thereunto had, may more fully appear; and the said agreement being so made, a treaty was thereupon afterwards, to wit, on the day and year first aforesaid, entered into between the plaintiff and defendant for the retaking of the said farm, by the defendant, of the plaintiff from *Michaelmas* then next; and thereupon afterwards, to wit, on the day and year first aforesaid, by a certain other agreement then made between the plaintiff and defendant, the plaintiff did agree to let the said farm to the defendant, from *Michaelmas* then next, as a yearly tenant, for the sum of 180*l.* and 1*l.* 10*s.* land-tax, provided the defendant should produce sufficient and good security for the regular payment of the said rent; the said rent to be paid on certain days in the said agreement more particularly mentioned; and by the said last-mentioned agreement it was further agreed, that when the defendant should quit the said farm, he, the defendant, should not carry away or dispose of any straw, either thrashed or unthrashed, or thatch, nor any dung, the produce of the said farm, or on the said farm at the time the defendant should quit; and that the defendant should keep the houses and fences of the said farm in good repair, and should commit no waste on the said farm; and that he the defendant would not sow any hay or corn the last half-year of his residence on the said farm, but would agree to the terms contained in a certain other paper, to wit, in the said first-mentioned agreement; and the said first-mentioned agreement and the said secondly-mentioned agreement being so made as aforesaid, the declaration then sets out mutual promises, and that the plaintiff let the farm, and the defendant entered and continued possessed until the 29th of *September*, 1834, when the defendant's tenancy determined. The declaration then proceeds to aver, that the plaintiff was ready and willing to perform all the terms of the first agreement as to the payment to be made by the incoming-tenant, and goes on thus:—and although when the said defendant was so quitting the said farm as aforesaid, to wit, on the day and year last aforesaid, the incoming tenant of the said farm wished to purchase of the defendant all the clover-hay, &c. (as in the first agreement); and the plaintiff offered to fix on a person to value, &c. (as in the said agreement.)

In an action by a landlord against a tenant, the declaration stated a breach "that the defendant, contrary to the agreement in the lease, threatened to commit waste unless he received a certain sum from the incoming-tenant, and that the tenant was, in consequence, compelled to pay the said sum to prevent him from so doing:—*Held*, bad. General damages having been assessed where one of the breaches in the declaration was bad, the Court refused to arrest the judgment, but granted a *venire de novo*.

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*Breaches.*—1st. That defendant carried away several loads of dung, &c. 2nd. That the defendant would not sell to the incoming-tenant clover-hay and meadow-hay. 3rd. *Breach.*—And the defendant further disregarding his said promise, when he was so quitting as aforesaid, to wit, &c. threatened to carry away from the said farm or to dispose of divers, to wit, 100 other loads of dung, the produce of the said farm, if the said incoming-tenant would not pay him the defendant divers large sums of money, in the whole amounting to a large sum, to wit, 100*l.*, for the same; and the defendant would have so carried away and disposed of the last-mentioned dung, if the said incoming-tenant had not paid him such money as last aforesaid; and the defendant thereby then compelled the said incoming-tenant, either to pay him the defendant, such monies as aforesaid, or to suffer the last-mentioned dung so to be carried away or disposed of by the defendant as aforesaid, whereupon the said incoming-tenant, being so compelled as aforesaid, did then pay the defendant the said monies for the said dung, in order to prevent the same from being so carried away and disposed of. 4th *Breach.*—That the defendant, when he was so quitting as aforesaid, threatened to carry away from the said farm, or to dispose of divers, to wit, 100 other loads of dung then being on the said farm, if the said incoming-tenant would not pay him the defendant for the same, divers monies, exceeding 1*s.* per load for the same by a large amount, to wit, by 100*l.*; and that the defendant would have so carried it off, if the incoming-tenant had not paid more than 1*s.* per load; and that the incoming-tenant did then pay the said monies in order to prevent the defendant from removing them. 5th *Breach.*—Committed waste. 6th *Breach.*—That the defendant threatened to commit further waste on the said farm, if the said incoming-tenant would not pay certain money, to wit, 20*l.* to him the defendant, and that defendant would have committed the waste if the incoming-tenant had not paid him the 20*l.*; and that the incoming-tenant, to prevent him from so doing, did pay him the said last-mentioned sum of money. There was also a 7th *Breach*, on which nothing turns.

The defendant pleaded several pleas which it is unnecessary to allude to, as the whole question turns on the breaches in the declaration.

At the trial before *Patteson, J.*, at the summer assizes for *Pembrokeshire*, in the year 1835, a verdict passed for the plaintiff on all the issues.

*John Evans*, having obtained a rule for arresting the judgment on the ground that there was a misjoinder of the breaches in the declaration, and that the jury had assessed the damage on all the breaches generally;

*E. V. Williams* and *Leach* this day shewed cause.—The defendant's application is erroneous; even supposing the breaches ill, that is only ground for a *venire de novo*, not for arresting the judgment. The breaches, however, are perfectly good. The agreement was to leave the dung on the premises which was produced on the land; can it be said that it is a compliance with the agreement, which was absolute, that he required to be paid a certain fine before he would fulfil his contract? Suppose a contract for the delivery of a book on the payment of 1*s.*; would it not be a breach of that contract to demand 2*s.*? The agreement is to leave the dung, and to leave it unconditionally; in all, amounting to but one preposition: merely leaving, therefore, is not sufficient; to comply with the terms of the contract, it must be a leaving

without payment. Besides, this is not an action of covenant; it is an action of *assumpsit* on the case for special damage for the infraction of the agreement. So it is with the sixth breach. He positively promises he will abstain from committing waste, viz. unconditionally—yet he asks payment. The argument was urged in moving for this rule, that the incoming-tenant and not the plaintiff was the party damaged. But if A. agrees with B. not to commit a trespass on C.'s land, B. must bring the action for A.'s violation of the agreement. The case of *Anderson v. Martindale* (a), is in point, and shews that the only question always is, with whom was the agreement made? [Parke, B.—Admitting that you may sustain the two breaches already argued, how can you uphold the sixth? All that the defendant's conduct amounts to is a threat of committing waste; but there was no waste committed, the tenant having purchased him off from committing it.] Then the application here is incorrect; it ought to have been for a *venire de novo*; not to arrest the judgment. It is laid down in Tidd's Practice, p. 922, where the grounds for granting a *venire de novo* are stated:—"Thirdly, when they (i. e. the jury,) give general damages on a declaration consisting of several counts, and it afterwards appears that one or more of them is defective." The cases of *Eddowes v. Hopkins* (b), *Grant v. Astle* (c), are quoted in support of this position. *Richardson v. Mellish* (d), *Day v. Robinson* (e), *Angle v. Alexander* (f), are in point to shew that where damages are given generally on a misjoinder of counts, a *venire de novo* is always awarded; a misjoinder of breaches is in no respect different. So in cases under the statute 8 & 9 W. 3. c. 11, where breaches have not been assigned, a *venire de novo* is always granted. [Parke, B.—In *Trevor v. Wall* (g), a *venire de novo* was refused; however, in that case, they took a distinction that there was no instance of a *venire de novo* to an inferior jurisdiction.

*Evans, contra.*—With the exception of *Holt v. Scholefield* (h), which is directly in favour of the defendants, all the cases cited were cases in error. That case, however, shews that the Court will arrest the judgment, and not award a *venire de novo*, where some of the counts are good, and others bad, and general damages are given. The case of *Eddowes v. Hopkins* differed from the present; and *Buller's* opinion was merely incidental, as the verdict was there entered on the good count only, on reference to the judge's notes. Still stronger for the defendants is *Sicklemore v. Thistleton* (i), as that was a case wherein (as in the present) the breaches were misjoined.

PARKE, B.—There is only the authority of *Holt v. Scholefield* against the power of the Court to award a *venire de novo*. There is no reason, but rather the contrary, why, if a court of error can grant a *venire de novo*, a court of original jurisdiction should not. As far, therefore, as relates to this point, the present case will overrule *Holt v. Scholefield*. The cause must, therefore, go

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(a) 1 East, 497.

(b) Doug. 377.

(c) Doug. 722.

(d) 3 Bing. 334.


(e) 1 Ad. & Ell. 554.

(f) 7 Bing. 119.

(g) 1 T. R. 151.

(h) 6 T. R. 691.

(i) 6 M. & Sel. 9.

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down to a new trial, in order that the amount of damages may be assessed on each of the breaches respectively, unless the parties can manage it between themselves.

The rest of the Court concurring,

*Venire de novo* awarded.

### PERRY v. SKINNER.

The 5 & 6 W. 4, c. 83, s. 1, is not retrospective in its operation, so as to enable a party entering a disclaimer under that act, for such parts of his invention as are not new, to have a right of action against persons who have infringed the patent before such disclaimer; and this, even where the infringement has been in respect of portions of the patent not included in the disclaimer.

CASE for the infringement of a patent. The declaration stated that after the assignment to the plaintiff of a certain patent, and after the passing of an act of parliament entitled "An Act to amend the Laws touching Letters Patent for Inventions," to wit, on the 30th of *April*, 1836, the plaintiff by and with the leave of Sir *Robert Mounsey Rolfe*, Knight, then being his majesty's solicitor-general, first had and duly certified by his fiat and signature in that behalf, entered with the clerk of the patent a certain disclaimer and memorandum of alteration in writing of part of the specification, (the same not being such disclaimer or alteration as extended the exclusive right granted by the letters patent,) by which disclaimer and memorandum of alteration, the same being under the hands and seals of the plaintiffs, they did disclaim as follows:—(setting forth the particular part of the specification disclaimed, and the alteration in the claiming clause, necessary to make it consistent with the previously mentioned part of the specification,) which said disclaimer and memorandum of alterations afterwards were filed by the said clerk of the patents, and duly enrolled with the said specification pursuant to the said statute. The declaration then averred that the defendant, within the term of fourteen years, to wit, on the 20th day of *February*, 1836, and on divers other days, &c. did counterfeit the said invention, and did use and practise the same otherwise than in relation to the said part of the invention so disclaimed; in breach, &c.

*Plea*—As to so many of the supposed grievances as were committed before the 30th of *April*, 1836, *actionem non*, because the said disclaimer, &c. was not entered or enrolled until the 30th of *April*, 1836, as aforesaid, and until after the committing of the grievances in the introductory part of the plea mentioned; and that the said invention for which the said letters patent were originally granted, was not at the time of making and granting the said letters patent a new invention; but on the contrary thereof, had been, as to a material part thereof, publicly and generally practised, used, and vended before the date of the letters patent; by reason whereof, the rights, &c. granted by the patent were void; wherefore, the defendant at the said several times when, &c. before the said 30th of *April*, 1836; and whilst the said rights, &c. were so void, &c. committed the said several supposed grievances, as he lawfully might.

*Replication*—That the said last-mentioned grievances were respectively committed, only with the relation to and in respect of those parts of the said invention, to which the said disclaimer and memorandum had no reference and did not apply; and that the said last-mentioned parts of the said invention were, at the time of making and granting the said letters patent, a new invention.

*Special Demurrer.*—In the margin it was stated, that the defendant meant to contend that the patent was, and by the replication is admitted to have been, void at the time of the alleged infringement, to which the plea is pleaded; and that, therefore, such infringement was lawful when it took place, and that it cannot be rendered otherwise by a subsequent disclaimer, even as to those parts of the patent which are not disclaimed or altered.

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*Wightman*, in support of the demurrer.—The question in this case is, whether, supposing the patent originally void, inasmuch as the supposed invention was not new, and afterwards cured under the 5 & 6 W. 4. c. 83, by a disclaimer of such parts as were not original, an infringement *in medio* is actionable. The first section of the new act is that which is particularly applicable to the present question; for by that section a party is allowed to enter a disclaimer of any portion of the specification, or a memorandum of alteration therein, &c.; and it then provides, “that such disclaimer or memorandum of alteration being filed by the clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all courts whatever.” By the old law, a patent void in part was void altogether. *King v. Else* (a), *Campion v. Benyon* (b). The effect of the statute is to obviate that consequence in the present case. It is clear, therefore, that by the words of the statute, that until filed and enrolled the disclaimer is altogether useless and of no effect. Now the plaintiffs themselves admit that the supposed infringement took place before the disclaimer, and it makes no difference that the infringement was in respect of parts of the invention that were new. There is nothing in the act to make a party a wrong-doer by relation. A perusal of the first section shews that the enrolment embraces as well the specification as the letters patent. [*Parke*, B.—It means “as part of the specification or of the letters patent,” as the case may be require.] However that may be, the act contains no retrospective words; there is indeed a proviso as to evidence which may be relied upon, viz.—“Provided also, that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except any proceeding by *scire facias*,) pending at the time when such disclaimer or alteration was enrolled; but in every such action or suit, the original title and specification alone shall be given in evidence, and deemed and taken to be the title and specification of the invention for which the letters patent have been or shall have been granted.” This, however, only means “if there is an action pending at the time, but contains nothing to constitute parties wrong-doers by relation. It applies possibly to a case where there may happen to be an interval between the time of obtaining the fiat for the alteration and the enrolment. It would be a very monstrous case, if a party having enrolled his specification, which, as it stood, contained on the face of it an invalidity in the patent, and so deceived the public, (say, for six months, by allowing it to remain unaltered,) should then be permitted by a disclaimer to prejudice the public. It may be right enough to give the act a prospective operation so as to make future infringers liable. [*Alderson*, B.—Your view seems fortified by the act requiring an advertisement, which no doubt is meant as a future warning to the public from the time of such advertisement.]

(a) 11 East, 189.

(b) 3 Brod. and Bing. 5.



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*Rotch, contrd.*—Since the statute, if the infringement takes place in a part of the specification not connected with the disclaimer, an action is maintainable; and for this reason, that a patent void in part is no longer void altogether. In the second place, the plea states that the patent was bad, because it was known before. But the act itself shews that when this defect of originality is discovered, something must be done pursuant to the directions of the act, before it can be called bad. I apprehend it was necessary for the plea, therefore, to shew the performance of all these matters as conditions precedent, viz. the allowance, &c. In other words, the process prescribed by the act is necessary to make it void. [*Parke, B.*—It is void before grant: because the crown can only grant to the first and new inventor; but if the crown grant contrary to law, it is void without the compliance with the conditions introduced by the crown.] The proviso in the act as to the disclaimer shews the disclaimer takes effect from the date of the letters patent; and consequently, that it cannot be merely prospective.

*Lord ABINGER, C. B.*—It cannot be doubted that the act is obscure; it would, however, work a great hardship, if the act could be construed to make parties wrong-doers by relation. The only argument in support of such a view, is the language of the proviso as to a disclaimer when an action is pending. We think the sound view is, that the specific introduction of this exception shews, that the legislature did not intend to make parties generally wrong-doers. If they will not allow a benefit of disclaimer during action, the legislature never could intend to make wrong-doers by relation.

*PARKE, B.*—I am of the same opinion.—Generally speaking, statutes ought to be construed according to their precise words; and in this statute the proviso that the disclaimer shall be deemed and taken to be part of such letters patent, or such specification may possibly admit of the construction contended for by the plaintiff, viz.—that they shall be deemed and taken to be part of the *original* letters patent or specification, as the case may be. It is, however, another rule in the construction of statutes that the precise words may be modified, if they lead to absurdity or inconvenience. Here the effect of an adherence to the strict words would be, to introduce the inconvenience of making parties wrong-doers by relation. We think that the act is to the same effect as if the words “from thenceforth” were introduced into it. The only circumstance to cast a doubt on this, is, the language of the proviso; but that is not sufficiently conclusive to enable us to say that the legislature meant to make parties wrong-doers by relation.

BOLLAND and ALDERSON, Barons, concurred.

Judgment for defendant.

## HOW v. PICKARD.

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CASE against a wharfinger for negligence. It appeared at the trial, before Lord Abinger, C. B., at the last assizes for the county of *Lincoln*, that the plaintiff had intrusted certain goods to the defendant, with an injunction that the goods were to be delivered to the plaintiff's own order. The goods were sold to a person who deceived the defendant in stating that he had the permission of the plaintiff to receive the goods. The venue was laid in *Lincolnshire*. A motion had been made to change the venue to *Yorkshire*. It was, however, retained on an undertaking by the plaintiff to give material evidence in *Lincolnshire*. The goods had been handed over to the purchaser by the defendant, at *Gainsborough*, in *Yorkshire*. At the trial, the plaintiff had a verdict, and

Where, on an application to change the venue from *Lincolnshire* to *Yorkshire*, it was retained at *Lincolnshire* on the plaintiff's undertaking to give material evidence there :—*Held*, that on his failing so to do, the objection ought to have been taken at the trial; as (in case it had been then taken,) the plaintiff might have answered the objection by giving material evidence at *Lincolnshire*.

*Balguy* now moved to set that verdict aside and enter a nonsuit, on the ground that the plaintiff had not complied with his undertaking; he, however, intimated that he had not made the objection at the trial.

*Sed per Curiam* (a).—The objection ought to have been taken at the trial; if it had been, they might have given material evidence in *Lincolnshire*.

Rule refused.

(a) *Ld. Abinger, C. B., Parke, Bolland, and Gurney, Barons.*

## MINSHALL and another v. LLOYD.

TROVER for steam-engines, waggons, rails, and machinery used in the working of a colliery. *Pleas*.—First, not guilty. Secondly, that the goods were not the property of the plaintiffs. Thirdly, the Statute of Limi-

A., the tenant for life in 1824, leased to B., the remainderman, for 21 years, a colliery,

with a power of re-entry by the lessor for non-payment of rent, or on insolvency of lessee. B. erected steam-engines which were affixed to the freehold in the ordinary way, and in the year 1827, having borrowed 850*l.* of C., assigned the colliery, together with the steam-engines and other implements used in the working of it, to the plaintiffs, as trustees in trust, to permit B. to have the use of them, and to remain in possession until default made by him in the payment of an annuity which he had granted to C. A. brought ejectment to recover the premises under the power of re-entry, and possession was delivered in the month of *June*, 1829. In *November*, 1829, the steam-engines and other implements were seized under a *f. fa.* issued by an execution creditor of B. :—*Held*, that the steam-engines, although removeable by B. during his tenancy, had, on the re-entry of A., become fixtures which vested in the lessor, and that the plaintiffs, who could only recover in right of B., could not maintain trover for them against the sheriff :—*Held* also, that B.'s having remained in possession after default in payment of the annuity, by reason of the omission of the trustees to enter, did not render the assignment invalid.

In trover against the sheriff, the warrant, under which goods were seized under a *f. fa.*, was not produced at the trial, nor was notice to produce it given. The bailiff who made the levy was proved to have delivered the warrant to his son; the son could only state his belief that he had either returned it to his father or to the sheriff's office. It was alleged to be the custom to deliver the warrant to the auctioneer, to be by him forwarded, together with the auction sheet, to the supervisor of the district, whose duty it was to transmit them to the head office of excise in *London*. Search had been made for it among the bailiff's papers, and at the sheriff's office; as also among the auctioneer's papers, and at the head office of excise; but the supervisor was not called, and no proof was given of a search among his papers :—*Held*, that sufficient proof was given from which the loss of the warrant might be inferred, so as to let in secondary evidence to connect the sheriff with the act of the bailiff.

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tations and issues thereon. At the trial, before *Vaughan, J.*, at the last summer assizes for the county of *Denbigh*, it appeared that, by a lease bearing date *June 1, 1824*, *Mrs. Youde*, the tenant for life of *Plas Madoc* estate, together with collieries therein, demised to her son *Edward Youde*, the tenant in remainder, all the mines of coal and other minerals upon the said *Plas Madoc* estate for 21 years, at a rent of 300*l.* per annum; the lease contained provisos to the effect, that the lessor should be entitled to re-enter either for non-payment of the rent during 40 days, or upon the insolvency, bankruptcy of, or any assignment for the benefit of creditors, by the lessee or his executors. *Edward Youde*, the lessee, for the purpose of working the colliery, had placed upon the premises steam-engines and other necessary matters, including the subject matters of the present action. In the year 1827, *Edward Youde* granted, for a valuable consideration, an annuity of 85*l.* for his life to a *Mrs. Whalley*, and conveyed to the plaintiffs, as trustees of *Mrs. Whalley*, his interest in the estate and mansion of *Plas Madoc*, and the mines of coal and other minerals, and steam-engines, waggons, &c. and other implements which then were, or at any time during the continuance of the annuity might be, on the said premises, for the purpose of working the mines upon trust, to permit the said *Edward Youde* to hold the said premises, until default for two months after any day appointed for payment of the annuity, with power to her to enter on such default and sell. *E. Youde*, having continued to work the mines for some time, underlet them for 14 years to the plaintiff and two other individuals. *Edward Youde* afterwards became insolvent, and the rent reserved on the original lease by *Mrs. Youde* to him became in arrear, wherefore she brought ejectment, and the premises, including the mines, were delivered to her by the sheriff, under a *habere*, in 1829. *Mrs. Youde* continued to work the mines. The steam-engines and other machinery were, in the *November* following, seized under a *fi. fa.*, and sold in the same month, to satisfy certain bankers in *Shropshire*, who were judgment creditors of *Edward Youde* and his sister. The present action was commenced in *October, 1835*, by the plaintiffs, as trustees of *Mrs. Whalley*, to whom no payment had been made on account of her annuity, to recover from the sheriff the value for which the said engines, &c. were sold. The warrant to the sheriff's officer was not produced, and no notice had been given to produce it; neither did any memorandum of the officer's name appear on the *fi. fa.* when produced. The officer stated, on the trial, that he had levied and would not have done so without the authority of the warrant; he was unable, however, to state what had become of the warrant; but said that it was the usual course to give the warrant to the auctioneer, whose duty it was to forward it to the Excise-office together with the auction sheet. Search had been made for it to no purpose among his own papers and at the office of the under-sheriff. He also stated that, to the best of his belief, he had delivered the warrant to his son whom he had put in possession of the goods after the levy. This was corroborated by the son, who, however, could not tell whether he had delivered the warrant back to his father or to the sheriff. The auctioneer's widow was also called, who had searched her husband's papers but was unable to find it; and a clerk in the head office of excise in *London*, produced the auction sheet but not the warrant; and moreover added, that it was not required by law to forward the warrant to the office. It appeared, however, from his testimony, that the district supervisor used, from time to time, to send a number of the auction sheets bound up

together, which were generally kept in the same cover, and that he (the witness,) had not made any search beyond the bundle so transmitted by the supervisor. Upon this it was objected for the defendant, that the supervisor ought to have been called, and that sufficient had not been done in order to render secondary evidence as to the warrant admissible. The learned judge overruled the objection, reserving leave to the defendant to move to enter a nonsuit.

The verdict passed for the plaintiff for 1000*l.*, the estimated value of all the machinery, engines, &c., subject, however, to a motion for a nonsuit; first, on the point of evidence above reserved; secondly, on the ground of the assignment void for fraud, there having been no change of possession; and moreover, being subject to a reduction to the amount of 760*l.*, the value of the steam-engines and fixed machinery, it being contended that the property therein became vested in Mrs. *Youde*, on her re-entry; and also on the ground that, being fixtures, trover could not be maintained for their recovery.

*Cresswell* having moved the Court, a rule was granted on all the points, except that arising on the presumption of fraud; the Court intimating their opinion that the deed evidently contemplated a continuing in possession by *Youde* until default, and that, *after default*, it was a mere oversight of the trustees in not taking possession.

*Jervis* and *Mathew* now shewed cause.—The first question will be, is there sufficient evidence to fix the sheriff? This will depend upon the sufficiency of the search for the warrant, in order to make the secondary evidence admissible. It is plain that the sheriff has no right to the custody of the warrant. The sheriff's authority is derived from the writ; that of the officer from the warrant; it is proper, therefore, that the officer should retain it for his own protection. *Res v. Stourbridge* (a), goes further even than the present case. In that case the mother of a pauper stated, that she delivered the indenture of the pauper's apprenticeship to the wife of a market-gardener, to deliver it to the overseers of the binding parish; that the market-gardener and his wife were both dead, the latter having survived her husband; and that search had been made in the chest of the binding parish for the indenture, and that it could not be found. This was held sufficient search to let in secondary evidence, as it was the duty of the overseers, if it had come into their possession, to have deposited it in the parish chest. It will be said, at the other side, that we ought to have noticed the supervisor of excise; Lord *Tentenden's* judgment in the above case affords a conclusive answer, viz:—that as in the performance of his duty, he must have been presumed to have transmitted it to the Excise-office; upon its not being found there, the natural presumption is, that it is lost. Besides, this falls within the class of cases which decide that when an instrument has done its duty, much less accuracy of search is required to let in secondary evidence of its contents. *Brewster v. Sewell* (b), *Freeman v. Arkell* (c), *Kensington v. Inglis* (d).

Secondly, it may be conceded that trover will not lie for any things which are really fixtures. However, we are prepared to contend in this case that

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(a) 8 B. & Cr. 96.  
(b) 3 B. & Ald. 296.

(c) 2 B. & Cr. 494.  
(d) 8 East, 273.

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these engines are not *fixtures*, but rather *annexations* as distinguishable from *fixtures*; and even supposing them to be fixtures, they are such as are privileged for the purposes of trade, and do not go to the lessor on re-entry. It is submitted, likewise, that there is a distinction between fixtures which the tenant voluntarily relinquishes, and those which the landlord takes by compulsion. If a tenant erects fixtures, he may remove them during the continuance of the term. If, however, he omits so to do, they become the property of the landlord. This was the doctrine acted upon in the case of *Lyde v. Russell* (e), upon the presumption of a voluntary relinquishment by the tenant. But such a presumption cannot arise where the landlord compulsorily takes possession of them. The same distinction is recognized in the case of *Longstaff* and another v. *Meagoe* (f). So where the tenancy is determined by death, the landlord is not entitled to fixtures erected during the tenancy. In *Davies v. Jones* (g), the case was as follows: certain parts of a machine had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the out-going and in-coming tenant:—*Held*, that these were goods and chattels of the out-going tenant, for which he might maintain trover. In *Lawton v. Lawton* (h), the question before the Lord Chancellor was, as to the nature of fire-engines; if they were part of the realty, they would go to his heir; if personalty, to the executor; and the Lord Chancellor held that they were personalty. The case of *Lord Dudley v. Lord Ward* (i), also supports my view, and shews that a great difference exists in contemplation of law between landlord and tenant, and heir and executor, in regard to fixtures. [*Parke, B.*—The question after all comes to this: your right is merely derived through *Edward Youde*, you cannot possibly possess a greater power than he did; if therefore, he, as tenant (even supposing trover lay for fixtures,) could not remove them after the expiration of his tenancy, could you do so?] It is now settled law, that if articles are merely *annexations* and not *fixtures*, and therefore removable without injury to the freehold, the lessee may remove them, and therefore trover will lie for them. *Elwes v. Maw* (k), *Penton v. Robart* (l), *Trappes v. Harter* (m).

*Cresswell, Tyrwhitt, and Welsby, contrà.*—The search in the present case was insufficient to let in the secondary evidence. The warrant was not a useless piece of paper after the levy had been made. It is frequently required for the protection of the party who had seized under it. No notice was served on the defendant to produce the warrant. In *Rex v. Stourbridge*, the person to whom the indenture was intrusted, was presumed to have delivered it into the proper custody. The contrary was proved in the present case; and, therefore, the supervisor ought to have been called, in order to ascertain whether he had the warrant. The elder *Wilde* (the bailiff,) speaks very doubtfully as to the return of the warrant to him by his son. If the paper given to him by the son was not the warrant, then a search ought to have been made among the son's papers. He does not profess to have kept it himself; he says, merely, that probably he gave it to the supervisor to forward to the Excise-office.

(e) 1 B. & Adol. 394.  
 (f) 2 Adol. & Ell. 167.  
 (g) 2 B. & Ald. 165.  
 (h) 3 Atk. 13.

(i) Ambl. 13.  
 (k) 3 East, 38.  
 (l) 2 East, 88.  
 (m) 2 C. & M. 153.

It was proved that the supervisor had not done so, and therefore he ought to have been called, or proof given that a search had been made among his papers. If it be proved there is any one place where the warrant might have been, and search is shewn not to have been made there, it is insufficient for the admission of secondary evidence. Besides, the fact of no notice having been served on the sheriff, clearly excludes secondary evidence of the warrant; and as to the admission by the bailiff, all the cases shew that to make that binding on the sheriff, there must be some recognition by the sheriff of the act of the bailiff. *Drake v. Sykes* (a), *Martin v. Bell* (b), *Hill v. Sheriff of Middlesex* (c), *Baldney v. Richie* (d), *Taplin v. Atty* (e).

As to the second point, it never can be a rule of law, that if an engine is affixed to the freehold, and some part thereof may be removed without injury to the freehold, it therefore ceases to be a fixture. The removal of these parts even, is clearly an injury of the freehold, as it renders the portion which remains unavailable; as for instance, if a door were removed from the hinges, or a handle taken from a pump. Neither is there any difference between the case where a tenancy expires by effluxion of time, and where it is put an end to by a forfeiture. *Storer v. Hunter* (f). Once affixed to the freehold they become the property of the landlord, subject to the power of disannexation vested in the tenant for the purpose of trade. The present is a case in which the default is altogether on the part of the tenant in not paying his rent. It is not like a case between heir and executor, where the tenancy determines by the act of God. Nothing is here shewn which vacates the rule of law, that where a landlord once gets possession, by reason of the relinquishment of his tenant, the tenant's right is gone. If the voluntarily cession of the tenant is the test to determine the landlord's right, then an unequivocal declaration of the tenant, that he did not intend that the landlord should possess the fixtures, would defeat such right.

One thing is, however, plain, that there being fixtures, trover will not lie for their recovery; this is shewn by the judgment of Lord C. J. Gibbs, in *Lee v. Risdon* (g), *Hallen v. Runder* (h), *Boydell v. M'Michael* (i), *Coombs v. Beaumont* (k). There is a different rule to be gathered from the case of *Trapper v. Harter*. That case, however, depended on its particular circumstances, and can now hardly be considered an authority on this point.

PARKER, B.—I am of opinion, that the rule ought to be made absolute for reducing the verdict to the value of the moveable articles; but that the rule for a nonsuit ought to be discharged. The first point to consider is, was there reasonable diligence shewn in searching for the warrant, so as to let in secondary evidence? This is a matter which it is peculiarly in the province of the judge who tries the cause to determine. In such a case, you are not bound to call every person who may possibly throw some light on the matter. The officer, *primò facie*, ought to have the warrant; he ought to retain it for his own protection, and is therefore its natural repository. He

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(a) 7 T. R. 113.

(b) 1 Stark. N. P. C. 413.

(c) Holt, N. P. C. 217; 7 Taunt. 8. S. C.

(d) 1 Stark. 338.

(e) 3 Bing. 184.

(f) 3 B. & C. 368.

(g) 7 Taunt. 191.

(h) 1 C. M. & R. 266.

(i) Ibid. 177.

(k) 5 B. & Adol. 72.

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says, in his evidence, that, to the best of his knowledge, he gave it to the auctioneer; and on cross-examination, he states, that he had searched in the office of the sheriff, and did not find it there. The son, in his evidence, states, that his father gave him the warrant, and that he thinks he re-delivered it to his father. The presumption clearly is, that the father delivered it to the auctioneer. The papers of the auctioneer are next searched; and neither the warrant or auction-sheet found among them. In the course of duty, the auctioneer would have transmitted them to the supervisor, whose duty it was to have sent them to the Excise-office, in *London*; and we must presume, that the supervisor has done his duty. Upon the whole case, the probability arises, that it was lost by the sheriff's officer or the auctioneer; and thus a sufficient case is made out for the admission of secondary evidence.

As to the second point, touching the steam-engines, we must take them to be the steam-engines usually employed in working a colliery, and as such, built into houses in the ordinary manner, which, in my judgment, amounts to being affixed to the freehold; and the case of *Lee v. Risdon* shews that, under such circumstances, they are *fixtures*. The rule, as laid down in the able work of Messrs. *Amos and Ferrard*, is, "quicquid solo plantatur, solo cedit." The right of the tenant is only to remove during the tenancy, such fixtures as he has erected for the purpose of trade, and so to make them cease to be parcel of the freehold. This right of the tenant enables the sheriff to sign them under an execution against the tenant. I assent to the cases of *Coombs v. Beaumont* and *Boydell v. M'Michael*, which establish, that such fixtures are not chattels within the bankrupt laws, although they are such for the benefit of a tenant's creditor under an execution, but that only during the existence of the tenancy. This is the common-law rule laid down by Lord *Holt*, in *Poole's case*, in *Penton v. Robart*, and in *Lyde v. Russell*. These engines never appear to have been goods and chattels, so as to be removable by the plaintiffs; all that they possessed was a colourable right, such as they gained in respect of the tenant, and this right did not exist after the day on which the premises were delivered to Mrs. *Youde*. The case of *Davis v. Jones* appears, by Lord *Tenterden's* judgment, to have depended on the fact, that there the subject of the action was not fixtures. Here there is no doubt that the steam-engines were left on the premises, after the expiration of the term of *Edward Youde*, by means of his forfeiture, (in whose right alone, the plaintiffs could shew any title,) and for that reason, I think they ceased to be recoverable in this form of action.

**BOLLAND, B.**—It appears to me that here this is sufficient search to let in secondary evidence of the warrant. As to the second point, I agree also, and for these reasons:—the engines are found to be affixed to the freehold, and therefore, I think trover is not maintainable. I do not go the length of saying, that there may not be engines which do not amount to more than personal chattels. In this case, however, having been shewn to be fixtures, the case of *Lee v. Risdon*, puts an end to all controversy on the point.

**ALDERSON, B.**—I am of the same opinion. Things which have once been affixed to the freehold, cannot become goods and chattels until the tenant has exercised his right of removal; this can only be done during the continuance

of his tenancy or his possession. Lord Holt (*l*) lays it down, that the sheriff may exercise the power, under an execution, which the tenant himself possesses, as to removing erections; and that is a power dependant on the continuance of his interest.

Rule absolute to reduce the damages.

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### DEWERS v. PIKE.

**A**SSUMPSIT for goods sold and delivered. *Plea*.—Non-assumpsit. It appeared at the trial, that the defendant was managing director of the *West Cork Mining Company*, and had purchased from the plaintiffs, on behalf of the Company, a machine for separating bricks from slate. The Company were incorporated by an act of parliament, which contained a clause, enabling the Company to sue and be sued, in respect of any contract made by any individual director on their behalf. The defendant intimated that the purchase was made for the *Cork Mining Company*, but signed his name to the contract, "*Pike, Director of the Cork Mining Company*," omitting to state, "as" director, &c. The plaintiffs having sued him in his individual capacity, a verdict passed for them at the trial.

The defendant, a director of the *West Cork Mining Company*, ordered certain goods of the plaintiffs, and signed his name P., director of *W. C. M. Company*, intimating at the time, that the goods were for the company. The company were incorporated by act of parliament, and in the act was a clause, enabling the company to sue and be sued, in respect of contracts made by any individual director on behalf of the company:—*Held*, that notwithstanding the defendant was liable in his private capacity.

*Erle*, this day, moved for a rule to shew cause why a nonsuit should not be entered for the omission of the plaintiffs, in not describing him in the declaration, as a managing director of the *West Cork Mining Company*; or, if the Court should refuse that, to restrain the plaintiffs from issuing execution against him in his private capacity, or otherwise than in the capacity of a managing director. He proceeded to argue, that the signature "Managing Director, &c." even with the omission that he contracted "as" Managing Director, was sufficient to shew that he could not be individually liable, more especially as the act of parliament contained the provision for the protection of parties entering into contracts on behalf of the company. [*Parke, B.*—You have not advanced the first step; the act affords a protection only where the party signs a contract in his representative capacity; but if he does not choose so to guard himself, then the contract is to be construed as binding the contractor. This was established in *Burrell v. Jones (m)*.]

*Lord Abinger, C. B.*—This is a contract where the plaintiff expressly contracts to pay; who knows that the plaintiffs did not contract on the faith of the defendant's responsibility.

*Parke, B.*—I dare say he intended to act on behalf of the company. He ought, however, to have used clear words; no doubt the plaintiffs had an option to sue him.

Rule refused.

(*l*) 1 Salk. 368.

(*m*) 3 Barn. & Ald. 47.



*Exchequer.*

## EDWARDS v. BREWER and another.

Goods were consigned to A., under a contract for delivery in the port of London, at so much per ton. On the arrival of the vessel on board which the goods were, at the wharf, where the captain usually traded; the captain called at A.'s countinghouse, and, in the absence of A. from home, requested B., his clerk, to give directions for the disposal of the goods. Shortly after, the clerk wrote to the captain, A. being still absent, suggesting that the goods had better be landed at the wharf on A.'s account. They were accordingly landed, and the wharfinger entered them in his book without the name of any consignee, but with the words "freight and charges," set opposite to them. While the goods were lying at the wharf, A. became insolvent, and the consignor stopped the goods:—*Held*, that the transitus was not determined. *Held*, also, that the consignor having received A.'s acceptance for part of the goods, was not bound to tender back such acceptance on the insolvency of the consignee before he stopped the goods in transitu.

THIS was an issue under the Interpleader Act, tried before Lord Abinger, C. B., at the sittings after last term. The question to be determined at the trial was, whether the plaintiff had a right to certain iron pipes, lying at the wharf of *Griffin and Co.*; as against the defendants, the assignees of *Carter*, a bankrupt.

It appeared at the trial, that the plaintiff, in *May*, had received an order for iron from the bankrupt; part of the goods had been forwarded in *July*, and on their arrival, a bill had been given under a contract for their delivery in the port of London. The price stated in the contract was, "at the rate of 7*l.* 5*s.* per ton; payment by acceptance, in six months."

The remainder of the goods, which were the subject of the present inquiry, were shipped in the *September* following, and a bill for the amount was drawn by *Edwards*, and accepted by the bankrupt. When the goods arrived, *Carter* was not at home. His clerk, however, wrote a note to the captain, at the wharfinger's, which note the wharfinger had orders from the captain to open, and act upon its suggestions. The note was to this effect:—

"Sir,—Mr. C. is absent from town. I think you had better land the pipes at *Griffin's* wharf, on his account."

The goods were landed in pursuance of that note, and entered in the wharfinger's books, but not in the name of any consignee. The captain, however, when called at the trial, stated, that the goods were landed, and by his direction, not as a delivery to the bankrupt, but on account of freight and charges; and the words "freight and charges," were set opposite to them. *Carter* became bankrupt on the 8th of *October*; on which day, plaintiff gave the wharfinger notice to stop the goods. The jury found a verdict for the plaintiff; the chief baron reserving leave to the defendant's counsel, to move to enter a verdict for them, if the Court should be of opinion, from the facts of the case, that the transitus had been determined.

Sir *F. Pollock*, moved accordingly:—

First, it is contended on behalf of the plaintiff, that the clerk was applied to, to give instructions as to the disposal of the goods, and that he said he could not; and moreover, that the goods were landed at the wharf, on account of freight and charges. No doubt, if either of the above facts had been proved, the case was at an end. The contrary, however, was the truth; for the clerk did give positive directions that the goods should be landed at the wharf on the bankrupt's account: and secondly, no mention of freight or charges was made till two or three days after the landing. The contract being for the delivery of the goods in London, at the price of 7*l.* 5*s.* per ton, without any mention of freight, shewed that the freight was included in the price. It seems to have been altogether an afterthought of the captain, in order to protect, if possible, the consignor of the goods. Moreover, admitting that

the vendor had a right to stop the goods in transitu, still, as a condition precedent to his obtaining the absolute possession of them, he was bound to tender back *Carter's* acceptance. In *Hodgson v. Loy* (a), the Court made it a condition, that the consignor should repay the portion of the price which he had already received, in order to entitle him to the possession of the goods. [*Parke, B.*—Without determining whether the stoppage in transitu amounts to a rescission of the contract, *Clay v. Harrison* (b), or only to a revesting of a lien, there is no doubt that it has the effect of putting the consignor in the situation of an unpaid vendor.]

Secondly.—Can it be said the transitus continues where a wharf is substituted by the consignee for his own warehouse as a place of delivery? No doubt, when a carrier deposits goods at a warehouse, and has afterwards to convey them to the house of the consignee, in that case the transitus is not determined; but if the consignor takes possession before it reaches his home, then it is at an end. Now the evidence went to shew, that the entry, as to "freight and charges," was not made until two or three days after the landing of the goods. Apply this test to the case? Who must have paid for the warehouse-room? Clearly, *Carter*. *Wyatt's* note specifically directs, that they shall be landed on *Carter's* account. The goods were to be delivered in the river, and it is plain that *Carter*, through the agency of *Wyatt*, made *Griffin's* wharf the place where he received them.

LORD ABINGER, C. B.—I was of opinion, at the trial, that the goods were landed at *Griffin's* wharf for the captain's accommodation; and that *Wyatt's* note amounted to nothing more than a doubtful opinion of the writer, as to the best course to be adopted in the absence of any directions from *Carter*. Besides, the captain stated that he directed the words, "freight and charges," to be placed opposite the entry of the goods in the warehouse-man's book; this shews that he had no intention of delivering them absolutely to the bankrupt.

PARKER, B.—If the goods were sent at the risk of the consignor, they would remain in him until delivery to the consignee. Now it is plain that *Griffin's* wharf was not the place originally intended for the landing of the goods; and is there any circumstance to shew that the consignee has taken possession? I think the clerk's letter cannot amount to that; I translate it thus:—"I cannot act in the absence of my master; and therefore, I only offer advice to the captain." Then what does the captain do? He makes an entry to his lien for freight; and, therefore, enters the goods in blank, adding the words, "for freight and charges." I think it impossible to say, that the transitus is ended thereby. As to the acceptance of the bill, *Feise v. Wray* (c) shews that the only effect of the delivery of a bill is, to diminish the vendor's lien *pro tanto*, if the bill is paid, but not to divest the vendor's right to stop in transitu.

BOLLAND, B., and GURNEY, B., concurred.

Rule refused.

(a) 7 T. R. 440.  
(b) 10 B. & Cr. 99; and vide *Stephens v. Wilkinson*, 2 B. & Adol. 320.

(c) 3 East, 93.

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## LANGRIDGE v. LEVI.

A., the father of the plaintiff, purchased a gun at the shop of the defendant, and stated, at the time, that he purchased it for the use of himself and his sons. The defendant warranted and represented that the gun was made by N., and was a good, safe, and secure gun. The plaintiff used the gun, which exploded, and shattered his arm. In case for this injury, the declaration averred the warranty by the defendant, and denied that the gun was made by N., or that it was a good, safe, and secure gun; of all which the defendant had notice, &c. It was also averred that he the plaintiff used the gun knowing and confiding in the warranty by the defendant. The defendant pleaded not guilty, and also denied that he had made the representation, &c. or that the gun was unsafe, &c. The jury having found a verdict for the plaintiff, on all the issues; *Held*, on motion to enter a nonsuit for want of privity between plaintiff and defendant, that the action was maintainable.

CASE. The declaration stated, that whereas one *George Langridge*, the father of the plaintiff, theretofore, to wit, on the first day of *June*, in the year of our Lord one thousand eight hundred and thirty-three, at the request of the defendant, bargained with him to buy of him a certain gun, to wit, for the use of himself and his sons, at and for a certain price or sum of money, to wit, the sum of twenty-four pounds; and the defendant then, by falsely and fraudulently warranting the said gun to have been made by *Nock*, and to be a good, safe, and secure gun, then sold the said gun to the said *George Langridge*, for the use of himself and his sons, for the sum of twenty-four pounds then paid by the said *George Langridge* to the defendant for the same; whereas, in truth and in fact, the defendant was guilty of a great breach of duty and of wilful and deceitful negligence and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by *Nock*, nor was it a good, safe, and secure gun, but, on the contrary thereof, was made and constructed by a maker very inferior as a gun-maker to *Nock*, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which premises the defendant, at the time of the making of the said warranty and of the said sale, had full knowledge and notice; and the plaintiff in fact says, that he, knowing and confiding in the said warranty, did use and employ the said gun, which, but for the said warranty, he would not have done; and that afterwards, to wit, on the 10th day of *December*, A. D. 1835, the said gun, then being in the hands and use of the said plaintiff, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and material thereof, then, and whilst the said gun was so in use by the said plaintiff, burst and exploded, became shattered and went to pieces, whereby and by reason whereof the said plaintiff was greatly cut, torn, wounded, lacerated, and otherwise hurt, maimed, and damaged, and became sick, sore, lamed, and disordered, and so remained for a long space of time, to wit, from thence continually hitherto, during all which said time the plaintiff suffered and underwent great pain of body; and afterwards, to wit, on the day and year last aforesaid, wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost and is for ever deprived of the use of his hand; and thereby hath been, and still is, and for ever will be, hindered and prevented from transacting and attending to his necessary and lawful affairs, and from the power of obtaining his livelihood, as he otherwise might and could and would have done; and hath lost and been deprived of, and from thence henceforth for ever will lose and be deprived of, divers great gains and profits and advantages, which he might and otherwise would have derived and acquired, but for the premises aforesaid, to wit, by following the trade and business of a stay-maker.

To this the defendant pleaded, 1st, the general issue; 2dly, that he did not warrant the said gun to be made by *Nock*, and to be a safe and secure gun, in manner and form, &c.; 3dly, that the gun was not a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials;

4thly, that the said gun did not, by reason and in consequence of the weak, &c., manufacture, &c., burst, &c., in manner and form.

*Replication* to all the pleas. *Similiter*.

At the trial, before *Alderson*, B., at the last summer assizes for *Bristol*, it appeared that the father of the defendant purchased the gun in the declaration mentioned, stating that he wanted the gun for the use of himself and his sons. The defendant offered him the gun in question, stating that it was made by *Nock*, and warranting it to be of a very superior quality. Thereupon the plaintiff's father purchased the gun for twenty-four pounds. On the 10th of *December*, in the year 1835, the plaintiff, who is second son of the purchaser of the gun, went out shooting with it, when the gun burst, and shattered his hand in such a manner as to render amputation necessary. For this injury the plaintiff brought this action, and recovered 400*l*. *Erle*, in the course of *Michaelmas* Term, obtained a rule to enter a nonsuit, on the ground that no sufficient cause of action appeared on the declaration, and that there was no privity between the plaintiff and defendant. Cause was now shewn, in *Hilary* Term, by

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*Bompas*, Serjt., and *Ball*.—This is an action for a tort. It is framed on the authority given by the Statute of *Westminster* to frame writs in *consimili casu*, and the general principle embodied is, that, in the law of *England*, there can be no wrong without a remedy. The question here will be, does there appear on this declaration a sufficient cause of action? If so, even supposing it to be stated in an informal manner, it is no objection after verdict. A contract was made with the father for a gun for the use of himself and his sons. The bargain having been with the father, the plaintiff could not succeed in an action on the contract; the action on the case was invented to supply such a deficiency. It is averred in the declaration, that, at the time of the sale, the defendant knew it was an insecure gun. It would be hard if a father were to buy a gun for the use of his son which the vendor knew to be bad at the time of the sale, and that the son could not have an action if he suffered an injury. The novelty of this action is no reason against its being brought. The same objection was stated in *Chapman v. Pickersgill* (a), and in *Ashby v. White* (b). Its novelty brings it within the scope of the action on the case. [*Parke*, B.—The question you will have to argue is, whether, if defendant, knowing the gun to be unsafe, sold it to another person for the use of the plaintiff, the latter could not maintain an action if injury followed.] The proposition we rely upon is, that whenever a duty is imposed by law on a defendant, and by a breach of such duty an injury ensues, the party injured has a right to recover. This duty may be twofold;—either arising out of a contract, or as imposed by law. If this duty arises out of a contract with a third party, it does not follow that an action on the case will not lie. In the case of *Mast v. Goodson* (c), although the declaration set forth a contract for the enjoyment by the plaintiff of an easement on certain premises of defendant, still it was held that case would lie against the defendant for obstructing the plaintiff in the enjoyment of such right. So in the case of *Everard v. Hopkins* (d), which was a case of a master contracting with a surgeon to attend his servant, (a case exceedingly analogous

(a) 2 Wils. 145.  
 (b) 2 *Ld. Ray.* 938.

(c) 3 Wils. 348.  
 (d) 2 *Buls.* 332.

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to the present,) it was held, that the servant, notwithstanding the contract of the master, might maintain an action on the case against the surgeon for bad treatment: and in *Pippin and wife v. Sheppard* (e), the same principle prevailed. Why, then, in the present case, shall the son have no remedy? The father can only recover on the breach of contract, and nominal damages for loss of service. So in Viner's Abridgment, Case, tit. Deceit (O. b.) this case is put:—"If I deliver my horse to a smith to shoe, and he deliver him to another smith, who pricks him, I may have action on the case against him, though I did not deliver the horse to him."

If this action is not maintainable, where is the remedy in the innumerable cases of minors who suffer injury arising out of contracts with parents or guardians?

Put the case of a sale of unwholesome food, where one person buys and another is injured. In *Brotherton v. Wood* (f), which was case for an injury to the plaintiffs by reason of negligent driving and the overturning of the defendant's coach, it was not questioned; and that form of action was correct, although there had been a contract between the plaintiffs and defendant.

Where a party undertakes to furnish that which, by his negligence, may prove injurious, he is bound to take care, otherwise he will be liable where damage ensues; and this is included in the broader principle, that where the common law imposes a duty, the party on whom it is imposed is liable for a breach of it. Thus in the case of a party keeping dangerous animals, and placing them in a situation where a third party is injured, an action of course will lie. In the case of *Dixon v. Bell* (g), where a defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, which was accordingly done, and a damage accrued to the plaintiff's son in consequence of the girl's presenting the gun at him, and drawing the trigger, when the gun went off; it was held defendant was liable in an action on the case.

Now, in the present case, how can the fraudulent contract with the father take away the son's right of action? If a man sells a dog, which he knows to be fierce, and warrants as quiet, and a child is bitten by it, can it be said that he is less liable than if he had kept the dog himself, and the child had suffered while the dog was in his possession? Will his responsibility be less because he sells it with a warranty of quietness? The case of the present defendant is a parallel one. If an apothecary delivers oxalic acid to a parent instead of salts, and a child takes it, and is injured, will not the child have an action? In the case of *Williams v. East India Company* (h), the principle we contend for is upheld.

If, then, the law imposes a general responsibility upon persons dealing in dangerous commodities, still more will it do so when fraud forms an ingredient in their dealing.

Now as to the second question, viz. the form of the declaration. It is averred that the defendant knew the purpose for which the gun was purchased. [*Alderson, B.*—Would it have made any difference if a party altogether a stranger had been injured?] I think the principle would extend even so far. In the present case, however, the defendant knew that the plaintiff

(e) 11 Price, 400.  
 (f) 3 Brod. & Bing. 54.

(g) 5 M. & S. 198.  
 (h) 3 East. 192.

was to use the gun. The declaration states that it was delivered for the son to use; so that, although there was no privity of contract between the plaintiff and defendant, still there was a privity of duty. Enough appears after verdict to shew that the defendant is liable. It is positively averred, that by means of the breach of duty the accident happened. The case, in a word, comes shortly to this: we have suffered an injury; the proper remedy is an action on the case, if we are at all entitled to recover: *prima facie*, we are so entitled; and it is for the defendant to shew we are not. It is no answer to say that there are few precedents. This is answered by the case of *Mast v. Goodson*.

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*Erle and Butt, contrâ.*—It is conceded that there is no precedent for the present action. It will be for the Court to say if there is any law by which the plaintiff is entitled to recover. The declaration states that the father purchased it, to wit, for himself and his sons. This being under a *videlicet*, is not a statement of any positive contract with the son, and is, therefore, immaterial. Every case of a contract includes the purchaser and his assigns: does this create a privity in respect of these assigns? All that is stated on the declaration is that the plaintiff used the gun. Now there was no obligation on the plaintiff to use the gun, neither does the declaration aver that he had any necessity to use it, or that he used it on a lawful occasion. For aught that appears, the plaintiff, having heard that there had been a warranty by the defendant, had, without his father's consent, taken the gun from a place of safe custody in which it had been placed by his father. If, therefore, up to this point, there was no breach of duty by the defendant, the special damage cannot be used to shew a breach of duty. The Court is called upon to infer, from the facts stated, a breach of public or private duty. Moreover, it is said, for every injury the law provides a remedy. How many misfortunes are there constantly occurring, for which no remedy could be applied by law. The proposition, more correctly stated, amounts to this, that for every injury resulting from the breach of a public or private duty, the law provides a remedy. It is material, therefore, to see if this declaration discloses a breach of public or private duty. Undoubtedly the law is, that where a party puts in motion an instrument immediately dangerous, and injury results therefrom, there is a public breach of duty. Now supposing, in the present case, the warranty to be out of the question, and a mere delivery by the vendor to the father, with a knowledge of the unsafeness of the gun, there is no authority to shew that such sale is a breach of public duty. The warranty to the father is only a representation; and there is nothing to shew that the gun was loaded when delivered to the father. All the cases cited at the other side contain this material ingredient, viz. that the instrument, at the time of the delivery, was actually dangerous; and this allegation has particular stress laid upon it in the judgments. So in the case of *Ilott v. Wilkes* (i) and *Bird v. Holbrook* (k), the instruments were placed loaded in a public situation. So as to mischievous animals: the animals must be placed in a situation likely to injure the public, and an injury to the public must ensue; added to which is, that such animals are necessarily dangerous. To instance, however, cases depending on a contract, let us suppose a chain cable sold by A. to B. for the use of a ship:

(i) 3 B. & Ald. 308.

(k) 4 Bing. 628.

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a storm arises, the cable is let go, and parts the ship, the strain being too great for it, and injury ensues to the captain and crew in consequence: can it be said that these latter could maintain an action on the case against the vendor? So where the owner of a horse, knowing it to be unruly, sells it with a warranty of quietness to a person, who lends it to a friend, who puts several other persons into a carriage, and drives it, and the carriage is overturned, and the persons injured in consequence; can it be said that the seller would be liable to each of these persons? The well-known distinction in all the cases is, whether the instrument or animals become immediately dangerous or destructive by the act of the defendant, or whether they require some other act done to them in order to make them so. The well-known case of *Scott v. Shepherd* (*l*) is in point, as there the final injury resulted to the plaintiff by reason of the impulse originally given by the defendant to the squib when actually lighting. There is a known head in Com. Dig.—Action on the Case for Negligence; (A. b.) “In keeping his fire;” this results from the immediate tendency in fire to cause destruction. The case of *Townsend v. Wathen* (*m*), cited by one of my learned friends, stands altogether on a different ground. [*Parke, B.*—Quite.] Suppose the maker of steam-boilers sells one which is insufficient, and it bursts and injures adjoining premises, could an action be maintained, by the party injured, against the seller? The case of *Witte v. Hauge* (*n*) has something of this nature; there an injury happened to premises adjoining those on which A. was employed in erecting a steam-boiler; and he in person and by his servant was superintending the erection; and he was held liable in an action at the suit of C., but that was on account of his personal management of the engine having been found as a fact by the jury; but it was there intimated that, in the absence of proof of such a fact, he would not be primarily liable. The representation made by the defendant to the father, is not such as a stranger ought to have relied upon; there is no privity or proximity between the plaintiff and defendant in the present case. [*Parke, B.*—Suppose a representation be made to one party for the purpose of being communicated to another; (and that this was to be collected from the declaration,) will not the party to whom the communication is so made be entitled to bring an action in case of injury?] There is no statement in the declaration, that the representation was ever made by the father to the plaintiff, or that the father was an intermediate agent between the plaintiff and defendant, so as to bind the defendant by such a representation. The father merely stated that he wanted it for himself and his sons; it does not follow from this that the representation is made to, or the contract with, each of the parties; in the absence of any positive statement in the declaration of such representation having been made directly to the plaintiff, it would be carrying the cases too far to hold the defendant liable. The Courts have held, in several cases, that the representation must be direct. *Scott v. Lara* (*o*). So in *Ward v. Weeks* (*p*), which was an action for slander with an allegation of special damage to plaintiff by reason of words spoken by the defendant; it was held insufficient in the plaintiff, in order to support the action, to prove that the defendant had spoken them to a third party, and that the special damage resulted from such third party having repeated them as the news of the defendant. So also in

(*l*) 3 Wils. 403.

(*m*) 9 East, 277.

(*n*) 2 Ld. & Ray. 33.

(*o*) Peake, 225.

(*p*) 7 Bingh. 211; 4 M. & P. 799. S. C.

*Vicars v. Wilcocks* (q). In all the cases relied upon at the other side there was a direct misfeasance on the part of the defendant to the plaintiff; and in those which are founded in contract a direct privity between the plaintiff and defendant; and that distinguishes all these cases from the present.

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*Cur. adv. vult.*

The judgment was delivered in this term, by—

PARKER, B.—It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity, in that respect, between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it. The question then is, whether enough is stated on this record, to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the action can be supported. We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that whenever a duty is imposed upon a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrong-doer; we think this action may be supported, without laying down a principle which would lead to that indefinite extent of liability so strongly put in the course of the argument on the part of the defendant, and we should pause before we made a precedent by our decision, which would be an authority for an action against the vendors, even if such instruments and articles as are dangerous in themselves, at the suit of any person whatsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been simply delivered by the defendant without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff *for the purpose* of being so used by him, with an accompanying representation to him that he might safely so use it, and that representation had been false to the defendant's knowledge, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman* (r), which principle is, that a mere naked falsehood is not enough to give a right of action, but it must be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him. If, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person for the purpose of being delivered to, and then used by, the plaintiff, the like false representation being knowingly made to the intermediate person, to be communicated by him, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the defect; nor could it make any difference, that the

(q) 8 East, 1.

(r) 3 T. R. 51.



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third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction, if the instrument be delivered in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way; and unless the representation had been made, the dangerous act could never have been done. If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury, bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, for the purpose of being used by the plaintiff, by loading and discharging it; and has knowingly made a false warranty that this might be safely done in order to effect the sale; and the plaintiff on the faith of that warranty, and believing it to be true, (for this is the meaning of the term confiding,) used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation, but it is no less. The delivery of the gun to the father is not indeed averred, but it is stated that, by the act of the defendant, the property was transferred to the father in order that the son might use it, and we must intend that the plaintiff took the gun, with the father's consent, either from his possession, or the defendant's; for we are to presume, that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appears. We, therefore, think, that as there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured. We do not decide whether this action would have been maintainable, if the plaintiff had not known of and acted upon the false representation, nor whether the defendant would have been responsible to a person, not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over; we decide, that he is responsible in this case, for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

Rule discharged.

### Doe dem. Lord DINORBEN v. ROE.

The service of the declaration on a servant of the defendants on the premises, is not of itself sufficient to entitle the plaintiff to a rule nisi for judgment against the casual ejector.

**RAINES** moved for judgment against the casual ejector. The service of the declaration was on a female servant of the tenant in possession on the premises, and he contended this was sufficient.

**ALDERSON, B.**—It has repeatedly been stated that the service must either be on the tenant himself or on his wife when residing with him; or if the service be on any other person, then there must be an acknowledgment by the tenant that the declaration came to his hands before the term.

Rule refused.

BOLTON, Assignee of THOROUGHGOOD, an Insolvent,  
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**T**ROVER for ten horses and ten sets of harness, the property of the insolvent. *Pleas*—first, not guilty; secondly, that the plaintiff was not possessed, &c. as of his own proper goods, &c. as assignee; thirdly, as to the conversion of the horses and harness in the declaration mentioned, that before the said *Thoroughgood* petitioned for his discharge, the defendant sold and delivered divers horses and certain harness, being the same in the declaration, for the sum of 150*l.* upon certain terms, viz., that the defendant should and might, until the price of the same should be fully paid, take into his possession the said horses and harness as a security for so much of the fine as should remain unpaid, and retain the same until payment thereof; that at the time of the conversion, 22*l.* 11*s.* 3*d.* of the price remained, and still remains due; and that after the plaintiff became possessed as assignee, the defendant took the horses and harness, and retained the same as a security, &c. as he lawfully might.

*Replication* and new assignment to the third plea—that the plaintiff issued his writ for the conversion of other and different horses and harness from those in the introductory part of the said plea mentioned.

*Plea* to the new assignment—not guilty.

The cause was tried before Lord *Abinger*, C. B., at the *Middlesex* sittings after *Michaelmas* Term; and at the trial it appeared, that the insolvent *Thoroughgood* undertook in *November*, 1835, to horse a coach of the defendant one stage on the *Canterbury* road. Five horses were, by defendant's order, delivered to the insolvent, and he horsed the coach accordingly. Three of the five having died, the insolvent purchased three others. On the 27th of *May*, 1836, the insolvent was committed to prison, and shortly after petitioned the Insolvent Debtors' Court. On the same 27th of *May*, in consequence of a written order from the insolvent, the five horses and harness for which the present action was brought, were delivered to the defendant: these five were worth 100*l.* It was objected, at the trial, that under the new assignment the plaintiff was not entitled to recover, unless he could shew that the defendant had got possession of more than the five horses and harness in the third plea mentioned; and, secondly, that there was no evidence that the plaintiff was ever possessed of them as assignee. The lord chief baron gave leave to the defendant to move to enter a nonsuit, if the Court should be of

Trover by the assignee of an insolvent to recover ten horses and ten sets of harness. *Pleas*, 1, not guilty; 2, that plaintiff was not lawfully possessed as assignee; 3, that before the insolvent petitioned for his discharge, defendant had sold him five horses and five sets of harness, (being those in the declaration) for 150*l.*, under an agreement that he might at any time, until the price was fully paid take and retain the same as a security; that at the time of the supposed conversion, 22*l.* 16*s.* was unpaid; and that after plaintiff was possessed, &c., the defendant took the horses and harness as a pledge under the agreement, which was the said supposed conversion. The plaintiff new-assigned to this plea, that the action was brought for the conversion of "other and different" horses

and harness to those in the plea. To this defendant pleaded not guilty. *Held*, that the plaintiff was entitled, under this new assignment, to shew that three of *five* horses seized by the defendant were not within the agreement stated in the plea.

The insolvent horsed a coach one stage for the defendant, and the latter had delivered to him five horses for the use of the coach. Three of the horses died, and the insolvent bought three others in their stead. On the day the insolvent went to prison, he sent an order directing the delivery of the five to the defendant, who accordingly took possession of them, and refused to deliver them to the plaintiff as assignee of the insolvent. The five were worth 100*l.*, and any two were worth 30*l.* The assignee brought trover to recover the three horses which had been purchased by the insolvent; the defendant pleaded an agreement under which he was entitled to take and retain the five horses sold by him to the insolvent, at any time, until the price was fully paid, and alleged that 22*l.* 10*s.* was still due:—*Held*, that there was no evidence that the insolvent had transferred the property in the three horses which he himself had bought, to the defendant.

*Held*, also, that if he had so transferred them, there was sufficient *prima facie* evidence of voluntariness in the transfer within the 7 Geo. 4, c. 57, s. 32.

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opinion that, under the new assignment, the plaintiff was not entitled to recover the three horses purchased by the insolvent; and directed the jury that the question for them was, whether there was a voluntary transfer in contemplation of taking the benefit of the Insolvent Act, intimating that in his opinion the evidence offered by the plaintiff was sufficient. The jury found for the plaintiff for the value of the three horses.

In *Hilary Term*, *Bompas*, Serjt., moved.—There was only evidence of one conversion; the new assignment of course means a different conversion from that alleged in the plea. The question will be, therefore, can the plaintiff, under the circumstances of this case, new assign where there is such a justification of the conversion put upon the record. In the present instance the new assignment is clearly unnecessary: if the plaintiff, instead of new assigning, had taken issue on the plea, he would have been entitled to recover upon proof that there were some of the horses which were not covered by the justification. The case of *Oakley v. Davis* (a) is quite in point. In that case, which was trespass for an assault and false imprisonment, the defendant having justified the assault and imprisonment under a writ sued out by him as attorney for J. M. against the plaintiff, indorsed for bail for 100*l.*, which was delivered to the sheriff, who by virtue thereof arrested and detained the plaintiff. The Court ruled that the plaintiff (instead of traversing the plea, as he ought to have done if the arrest were irregularly made by the sheriff's officer, without a sufficient warrant from the sheriff,) having new assigned that the trespass complained of was upon another and different occasion than that stated in the plea; and after the supposed arrest therein mentioned, the defendant, on proof of the facts as before stated, was entitled to a verdict. [*Parke*, B.—In that case the plaintiff was bound to prove an arrest different from that justified; but under this new assignment, it will be sufficient if he prove that there were horses seized not protected by the alleged right of lien.] In the case of *Barnes v. Hunt* (b), where to a declaration for several trespasses to plaintiff's land, on divers days, the defendant justified under a license from the plaintiff on the said several days, and the plaintiff replied *de injuria*; it was held, that evidence of a license which covered some, but not all, of the trespasses proved, within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication; so here, if the plaintiff had taken issue on one plea of justification, and we had not proved that all the five horses were covered by the lien, the plaintiff would have recovered for such as were not so covered. Suppose an action for ten horses sold and delivered; plea—payment; and the plaintiff new assigns; at the trial he proves the sale of ten horses, and no more. Would not the defendant be entitled to a verdict? The very definition of a new assignment shews that a party resorting to it must prove "other and different" matters from those justified by the plea. Put the case of an assault, and plea of *son assault d'emesme* with a new assignment, must not the plaintiff prove two assaults to entitle him to recover? In fact, otherwise it would be a hardship on the defendant, as this mode of pleading throws him off his guard; for as it admits the terms of his justification, it prevents him from bringing witnesses to prove it at the trial. [*Lord Abinger*, C. B.—You say that if the action had been brought for the conversion of ten horses, and the defendant had pleaded a

(a) 16 East, 82.

(b) 11 East, 451.

right of lien, and the plaintiff had new assigned, he would have been bound to prove that there was at least *one* horse more converted, in order to entitle the plaintiff to recover.] Precisely so; but if he had traversed the justification instead of new assigning, then he might have recovered *pro tanto* for as many as the justification did not embrace. [Parke, B.—Suppose there had been a replication *de injurid*, you admit that the plaintiff might have recovered the horses not included in the lien; what prevents him from doing the same under the new assignment? As in *Barnes v. Hunt*, if instead of replying *de injurid* the plaintiff had new assigned, is there a doubt that he might not have proved trespasses to which the license did not apply?] There is a doubt; for the plaintiff throws out of consideration all that is justified by the plea, and in the language of his new assignment having admitted the correctness of the justification, goes for “another and different conversion.” [Parke, B.—All he admits is *some* conversion.”]

On the second point the Court granted a rule; but after time taken to consider, they refused it on the point above argued; Parke, B. observing that the new assignment was merely an informal denial of the plea.

*Kelly, Godson, and Lee*, shewed cause in this term.—There is no evidence of any antecedent contract between the insolvent and the defendant; even if there had been any such evidence as to two of the horses, it clearly did not affect the other three, which were purchased by the insolvent from strangers to the defendant, in lieu of those that died. The only question then left is, is there not evidence of a voluntary transfer in contemplation of insolvency, within the 7 Geo. 4, c. 57, s. 32. Admitting that it lies on the assignees to prove this, *Doe v. Gillett* (c), is there not a sufficient amount of evidence here? The transfer is made without any proof of pressure on the part of the defendant; and is made as the time he goes to prison with a view to taking the benefit of the Insolvent Act. The debt due to the defendant by the insolvent is 22*l.* 11*s.* 3*d.*; the property transferred is nearly of five times the value.

*Bompas, Serjt., and Peacock, contrd.*—It is plain that the insolvent was at one period indebted to the defendant for five horses, and that the defendant believed he had a lien for the five. Now the delivery to this defendant of the five horses, was evidence to go to the jury of a delivery to him in satisfaction of an antecedent debt. The learned judge never left it to the jury whether the defendant had a claim upon the insolvent; the only question submitted to them was, whether this was a voluntary transfer. This was put to them in a manner which would lead them to infer that the defendant was bound to prove a pressure, whereas, in point of law, that lies upon the assignee. Here the whole evidence of voluntary preference was the order signed by the insolvent, that of itself was not sufficient to shew the absence of pressure; moreover, it did not appear that the insolvent went to prison voluntarily. At all events, the plaintiff might have called the foreman of the defendant (who possessed in the first instance *Thoroughgood's* order,) to explain the circumstances under which it was given.

Lord ABINGER, C. B.—This rule must be discharged; and I cannot avoid remarking that the whole of the controversy has arisen from that which was

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never intended to produce such a consequence; namely, the new forms of pleading. Under the old plea of the general issue, the case, I presume, would have taken some such course as this:—The plaintiff brings his action to recover five horses: the defendant contends that the horses were delivered to him as a pledge, for the price of five horses bought of him by the insolvent six months before, and which it is admitted were paid for except 22*l.* 16*s.* The plaintiff would reply that two of the horses are worth more than that, and therefore three never could have been delivered as such security; and those are the horses he goes for. The new form of pleading has caused the perplexity; it is said you have no right to look at the admission contained in one plea, in order to support another; that is true: but though a counsel is not bound to admit a fact, yet if an admission be made for a certain purpose, it may be taken for granted altogether. Here, then, was no occasion for the defendant to have given any evidence of the pledge of the five horses, for the matters alleged in the third plea are admitted; the plaintiff says, “I am not going for the original five horses, but for three others. The question then arises upon the first and second pleas, whether there is sufficient evidence to shew that these horses were delivered in satisfaction of a debt, or by way of lien. No evidence is given of the existence of any lien except as to the original five horses; nor is there any suggestion of a debt except upon the original contract, and which debt is admitted to be reduced to 22*l.* Taking the whole of the circumstances together, it appears to me there is no evidence from which the jury could infer any intention on the part of the insolvent to change the property in the three horses. If there had been any proof that the insolvent was indebted to the defendant to the amount of 100*l.* or 150*l.*, then the question would have arisen as to whether the transfer was intended to satisfy that debt; but there was no evidence of any debt except that referred to in the third plea; and it is plain, that although the insolvent might have meant to send the two horses, in pursuance of his contract to return them if he did not pay for them; yet he could never have intended to change the property in the other three. But I am not prepared to say that the case is entirely denuded of all evidence of voluntariness. What pretence could the defendant have to ask for the five horses as a pledge for a debt of 22*l.* only. No doubt it is incumbent on the assignee to give evidence of the voluntariness, but I think from the circumstances of this case there was sufficient to go to the jury. Here is the delivery of three horses by a man just gone to prison, and who clearly intended to petition the Insolvent Court for his discharge; and a delivery to a creditor from whom he could not apprehend any personal danger, and who was not likely to make any claim to the property. These were circumstances from which the jury might infer that the transfer was voluntary.

PARKE, B.—I am also of opinion, that the rule should be discharged; although I certainly felt some doubt, whether, if the case could have been disposed of on the first ground, there ought not to have been a new trial; and I am by no means satisfied, that there was not some evidence of a transfer of the property either out and out, or by way of lien. But the case went to the jury upon a different ground, viz:—assuming that there was a debt, and assuming a transfer of the property, still that the assignee is entitled to recover, because the transfer was voluntary. I have heard nothing to induce

me to believe, that the summing up of the learned judge was not correct. He did not say that the onus of proof was not on the plaintiff, but that no more evidence was necessary to be given than had been given; and in that I concur. There is no question upon the law; supposing this to be a transfer of the property, it is taken out of the insolvent, unless the assignee can bring himself within the 32nd section of the Insolvent Act. The question then is, whether there was *prima facie* evidence of the transfer being voluntary. The assignee might have given further evidence; he might have called the foreman to shew how he became possessed of the order, but he was not bound to do so; he laid before the jury, such circumstances as might reasonably induce them to draw the inference, that the act of the delivery of the horses, proceeded from the insolvent himself, and not from the pressure or demand of the defendant. The plain fact is, that this transfer must have been made for the purpose of satisfying a debt of 22*l.* only; and it is very unlikely, that any person would agree to give horses of the value of 100*l.*, as a security for so small a debt. That looks as if the delivery were for some fraudulent purpose. Again, the transfer is made on the very day on which the insolvent went to prison, when he could have no advantage from delivering up the horses. These circumstances appear to me sufficient on the part of the plaintiff, to satisfy the burden which the law has cast upon him, of shewing the transfer to be voluntary. I can find no fault with that part of my learned brother's charge, in which he states, that less cogent proof was necessary than in the case of bankruptcy; because here, the transfer being made at the commencement of the imprisonment, it was not necessary that the party should have made it in contemplation of taking the benefit of the Insolvent Act, but only that it should be shewn to be voluntary.

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ALDERSON, B.—I am of the same opinion. The only evidence of the transfer of the property is a note, given by the insolvent to his servant, to deliver the five horses to the defendant. The question is, whether that order is sufficient to raise any reasonable presumption of a transfer of the property or the giving a lien. By looking at the circumstances of the case, we find that five horses were bought of the defendant by the insolvent, and used by him as his property, and that the residue of the debt due to the defendant was only 22*l.*; the five horses were proved to be worth 100*l.*, and any two of them of the value of 30*l.*; and that only two of these horses were originally delivered by the defendant to the insolvent. From these facts I should infer, that if the horses were to be re-delivered in consequence of any arrangement respecting the payment of the price, it might be reasonable that two of the original five would be delivered, and that the delivering of the other three would have no reference to such bargain. There is no reasonable evidence of any transfer of the property as to the three horses, which must have been delivered for the purpose of being held by the defendant for the use of the insolvent until after he came out of prison, or on some such understanding. Then, as to the second point, there was abundant evidence upon which the jury might have found that the transfer was voluntary as respects the three horses.

GURNEY, B. concurred.

Rule discharged.

*Exchequer.*

WILLIAM STONE, Executor of BENJAMIN ROGERS,  
v. SARAH ROGERS, Executrix of GEORGE ROGERS.

A. agreed with B., by a written agreement, that B. should have A.'s tenement for 20l.

a-year, and the whole of A.'s keep and maintenance, during the life of B.; the said B. to take off the stock at 75l. 10s. B. took off the stock, and had possession of the tenement for his life:—

*Held*, that the executrix of B. was liable, in an action of *indebitatus assumpsit*, for goods sold and delivered, for the 75l. 10s. the price of the stock.

*Held*, also, that as the document amounted only to an agreement to grant a future lease, and not to a present demise, it was properly stamped with a 1l. stamp.

DEBT by the executor of one *Benjamin Rogers*, deceased, against the defendant, executrix of *George Rogers*, deceased. The declaration contained two counts; the first for 100l. for goods, cattle, stock, and other merchandize, then sold and delivered; second, account stated. *Pleas*—first, general issue; second, that the said *Benjamin*, in his lifetime, and at the time of his death, was indebted to the said *George Rogers*, in his lifetime, in divers monies, to wit, in 500l., for work before then done by the said *George Rogers*, with his horses, cattle, ploughs, harrows, carts, carriages, and otherwise, for the said *Benjamin Rogers*, at his request, and in 500l. for meat, drink, &c.; third, and in 500l. on an account stated.

*Replications*—Traversing set-off, and issue.

It appeared at the trial, before *Williams, J.*, at the last spring assizes at *Taunton*, that the plaintiff's testator was brother of *George Rogers*, the defendant's testator; and that *Benjamin Rogers* had, for several years before his death, lived and boarded with his brother, *George*, at *Wiveliscombe*. *Benjamin* farmed a copyhold estate called *Davys*, situate near *Wiveliscombe*, which he held for the term of his life; but shortly before his death he purchased the reversion in fee of the estate. For nine months before his death, *Benjamin* was unable to attend to his farm, by reason of illness; and on the 10th of *September*, 1836, believing that he should never recover from his illness, he entered into the following agreement with *George*, which was produced in evidence, stamped with 1l. agreement stamp:—

“ *September 10th*, 1836.

“ An agreement between *Benjamin Rogers* and *George Rogers*, (that is to say,) *George Rogers* to have my tenement, called or known by the name of *Davys*, situated at *Croford*, in the parish of *Wiveliscombe*, in the county of *Somerset*, for 20l. per year, and the whole of my keep and maintenance during the life of the said *George Rogers*, and to take possession immediately, and begin to pay rent at *Michaelmas*: the said *George Rogers* to find seeds, lime, gads, and horse labour, for drawing materials for repair of the cyder-press engine, and twenty-nine hogsheads to remain on the place; and to take off the stock at 75l. 10s., and to pay for the grass-seeds. The stock is as follows:—

Hay, at.....	£ 7	0	0
Apples .....	10	0	0
Wheat .....	16	10	0
Two bullocks, at .....	21	0	0
Eight sheep, at 26s. ....	10	8	0
Twelve lambs, 16s. ....	9	12	0
Hurdles .....	1	0	0
	£ 75	10	0

“ As witness our hands, this 10th day of *September*, 1836,

“ B. ROGERS,

“ W. STONE,

“ E. R. STONE.”

The particulars of the plaintiff's demand were the same as those in the agreement.

About a fortnight after this agreement, *Benjamin Rogers* died. There was proof at the trial, that a valuation had been made of the stock on the farm at *Davys*, at 75*l.* 10*s.*, and of a disposal of some of the cattle on the farm by his brother and the defendant, (his widow,) after the agreement; it was also proved that they had gathered apples, and that the defendant had admitted that she and her husband had bought the goods. After action brought, the defendant's attorney had tendered to the plaintiff's attorney 75*l.* 10*s.*, which he declined to receive, unless he got security for his costs in the shape of a cognovit. This was, however, refused by the defendant's attorney. A verdict passed for the plaintiff for 75*l.* 10*s.*; the learned judge having reserved liberty to the defendant to move to enter a nonsuit on a point taken at the trial, viz., that the agreement, amounting to a present demise, was inadmissible for want of a lease-stamp.

*Bompas*, Serjt., accordingly obtained a rule on a former day in this term, and relied on *Corder v. Drakeford* (a).

*Erle* and *Bere* shewed cause.—No freehold passed by this instrument, inasmuch as it was not under seal; it, therefore, amounted to nothing more than an agreement, and as such is properly stamped as an agreement.

*Bompas*, Serjt., interposed, and objected, that unless the agreement were specially declared upon, it was a variance; as the form of declaration for goods sold and delivered excluded part of the consideration, viz., the transfer of the possession of the land.

*Erle* and *Bere*, *contrà*.—The general rule of pleading is, that whenever there is a contract for the sale of goods, which contract has been fulfilled, and in no part left unperformed, the action may be brought in the form of goods sold and delivered. *Leeds v. Burrows* (b). This principle is fully explained in *Chitty on Pleadings*, 372 and seq., and in *Selw. N. P.* 71. This is still the case, however complex the original agreement. Even if we suppose, in the present instance, that the agreement had never been performed as to the land, the delivery of the goods binds him to pay for them, and entitles us to resort to this form of action for their recovery. [*Parke*, B.—True; but were the goods here to be paid for *simpliciter*? Was not the contract, in consideration of the goods and of the agreement, to deliver possession of the farm? If so, you will be met by the case of *Corder v. Drakeford*.] Here the time for the performance of the agreement has run out; the goods have been delivered. In what other form could we have declared? Besides, this may be treated as a divisible agreement, the former part of which has no reference to the latter. The maintenance of *Benjamin* would form the consideration for transferring possession of the land: the taking off the stock would be the consideration to support the *indebitatus* count. The tender, by the defendant's attorney, must be treated as an admission by the defendant that the 75*l.* 10*s.* was due.

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(a) 3 Taunt. 382.

(b) 12 East, 1.



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*Bompas, Serjt., and Butt, contrd.*—The proposition in all the text-books, fortified by the authority of decided cases, is, that the whole of the consideration must be set out. You may go for part of a promise, still you must shew the entire of the consideration. The judgment of Lord *Ellenborough*, in *Clarke v. Gray* (c), shews this. [*Parke, B.*—That was a special count.] It is submitted there is no distinction in this particular between a general and a special count. In *Swallow v. Beaumont* (d), which was an action of covenant, the omission to set the entire of the consideration was held a fatal variance. [*Parke, B.*—The question, after all, is this,—is not this an obligation on the defendant's testator to pay 75*l.* 10*s.* in consideration of the other party performing his agreement? Suppose a person to say to another, "Grant me a lease and the stock on your farm, and I will pay you for it," would he not be indebted for the stock upon the grant of the lease? If that be so, all the plaintiff's side of the agreement has been performed; and this is not an agreement to pay a sum for both jointly; it is to pay a sum for the goods when the agreement is signed.] This contract is not divisible; the consideration is, that the plaintiff's testator should grant a lease and do several other things; this is an agreement for goods sold and delivered, and for a lease, all in one. The cases put at the other side, amount to this, that if, under a special contract, there are several goods sold, delivered at several different times, then, on the delivery of all the goods, the price will be recoverable in an action of *indebitatus assumpsit* for goods sold and delivered; but when the special agreement contains a complex consideration, as for goods sold and delivered, and other things not capable of being classified as goods sold and delivered, it is different.

*PARKE, B.*—I am of opinion that this rule ought to be discharged. Although the argument has arisen in a different form than on the point reserved by the learned judge, I think we may properly deal with the whole case, and see if the plaintiff can recover. This is an action brought by the executor of *Benjamin Rogers*, against the executrix of *George Rogers*, for goods sold and delivered. An agreement was put in, on the part of the plaintiff, and it was objected to as being improperly stamped; the learned judge, however, received the evidence, giving leave to the defendant to move to enter a nonsuit on the ground taken in the objection. I think the agreement was receivable in evidence, and that it was on a proper stamp. It is, in point of fact, nothing but a mere agreement to grant a lease. [His lordship here read the agreement as to the grant of a lease.] It could not operate as a lease for life, being without deed or livery. The latter part of the agreement would *prima facie* entitle the plaintiff to recover, if he shewed that there had been a delivery of the goods to the defendant's testator, and a compliance with the agreement, on his part, by taking to the stock and having possession of the land; and this, I think, is shewn as well by other circumstances, but more especially by the offer to pay by the defendant's attorney, which was equivalent to an admission that the defendant's testator had all the benefit of his portion of the agreement, including the possession of the land.

A second objection is made, that even supposing the plaintiff is entitled to

(c) 6 Ea., 564.

(d) 2 B. & Ald. 765.

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recover, still that he cannot do so in this form of action. I agree with Mr. *Starkie*, who says (e), that "when the terms of a special agreement have been performed, so as to leave a mere simple *debt* or *duty* between the parties, the plaintiff may give the circumstances in evidence, and recover under a general count in *indebitatus assumpsit*." It remains to be seen, therefore, whether in this case every thing has been done to establish the relation of debtor and creditor, as for goods sold and delivered, between the plaintiff's testator and the defendant's testator; and I am of opinion that there has. It might have been difficult to frame a count in *indebitatus assumpsit* in this case, if no precise sum had been agreed upon to be paid for the goods alone; in other words, if the money were payable for the lease and goods. There is, however, ample evidence in the agreement that the money was to be paid for the goods alone. If, indeed, the instrument contained a stipulation that the granting of the lease should be a condition precedent to the payment for the goods, then no action could be brought for the price of the goods until the lease was granted. Here, however, there is no stipulation; and, even if there had been, the admission of the defendant's attorney would be sufficient evidence of a binding contract to pay for the goods. The actual grant of the lease was no condition precedent; all that was stated in the instrument was an agreement for a future lease, and the instrument itself amounted to that. Even in the case I have already put, of one entire price for the goods and for something else, a question might arise, whether the defendant's testator, having taken to the goods, might not have raised a liability in herself to pay for the goods as on a new contract on a *quantum meruit*. It is unnecessary, however, to offer any definite opinion upon that point, as I think that, in the present case, all the conditions precedent have been performed which threw the obligation upon the defendant's testator, of paying for these goods as goods sold and delivered.

BOLLAND, B.—I am of the same opinion, and for this reason. It is said by the defendant, (I think truly,) that if there be a special agreement stipulating for the performance of several things, that it ought to be declared upon as such; but the admission of the defendant's attorney offering to pay the 75*l.* 10*s.* amounts to a liability on the part of the defendant, which quite alters the complexion of the case.

ALDERSON, B., concurred.

Rule discharged.

(e) 2 Stark, on Evid. 55.

*Exchequer.*

## COHEN v. HUSKISSON.

In trespass for assault and false imprisonment, the defendant pleaded that he was possessed of a shop, and carried on the business of a baker there; that the plaintiff had been in the shop, making a great noise and disturbance, and abused, &c., the defendant, in breach of the king's peace: it then went to aver, that the plaintiff went out into the street, and continued there to make a noise, &c., and to abuse the defendant, and caused a large concourse of people to assemble, and so disturbed and obstructed the defendant in his business, in breach of the peace, and thereby caused a riot and disturbance: and that the defendant, in order to preserve the peace, sent for a policeman, who took plaintiff into custody on his refusing to cease his noise, &c. Held, that, omitting all the allegation as to a riot, the plea was a sufficient justification. It was proved, that the plaintiff, on leaving the defendant's shop, went into the street, and uttered loud abuse against him, and thereby attracted a large concourse of people, so as to obstruct the streets; that, thereupon, the defendant sent for the police, who requested plaintiff to leave the place, and, on his refusal, took him before a magistrate:—Held, that these facts amounted, in law, to a breach of the peace.

TRESPASS for assaulting the plaintiff, taking him to a police station-house, and imprisoning him. *Pleas*—first, not guilty; secondly, as to assaulting the plaintiff and compelling him to go through the streets to the station-house, and imprisoning him there, and taking him through the streets to the public police-office, and again imprisoning him; that the defendant was possessed of a dwelling-house and shop, in *St. Mary, Whitechapel*, in the county of *Middlesex*, in which he carried on the business of a baker; and that the plaintiff, just before the said time, when, &c. had been and was in the shop of the defendant, and made a great noise and disturbance therein, and insulted and abused the defendant, and disturbed and disquieted him and his family in the possession thereof, in breach of the king's peace, and hindered and obstructed the defendant in the carrying on his business in his shop; and that the plaintiff, just before the said time, when, &c. had departed from the shop of the defendant into the public street, there, immediately in the front of the dwelling-house and shop of the defendant, and just before the said time, when, &c., continued to make a great noise and disturbance in front of the same, and continued to insult and abuse the defendant, and caused a large concourse and mob of persons to assemble, and remain, and continue opposite the dwelling-house and shop of the defendant, and greatly disturbed the defendant in the possession of his shop, and hindered and obstructed him in his business, in breach of the king's peace, and caused and created great riot and disturbance in the street, whereupon the defendant civilly requested the plaintiff to cease such his noise and disturbance and creating such riot, and go from the house and shop of the defendant, which the plaintiff refused to do, but still continued to make such noise and disturbance, whereupon the defendant, to preserve the peace and restore order and tranquillity, sent for certain police-officers, and requested them to remove the said plaintiff from before defendant's house and shop; and the police-officers then civilly requested the plaintiff to cease his noise, riot, disturbance, and abuse, and go from the house and shop of the defendant, which the plaintiff refused to do, and because the plaintiff so refused, and persisted in remaining before the house of the defendant, and making such noise, riot, disturbance, and abuse, and hindering and obstructing the defendant, he, the defendant, to preserve the peace and restore tranquillity, gave charge of the plaintiff to the police-officers, and desired them to take him to the police station-house. The plea then alleged that the police-officers took the plaintiff to the station-house, and from thence, by order of the defendant, to a public police-office, and that the plaintiff was examined before the magistrates concerning the premises, who admonished the plaintiff for his riotous and disorderly conduct, and discharged him.

To this there was the general replication *de injurid*.

There was a similar count in the declaration, for assaulting the plaintiff's wife, and a similar plea.

At the trial, before *Gurney, B.*, at the *Middlesex* sittings in this term, it appeared that the defendant kept a baker's shop in *Whitechapel*, and that, in the month of *July* last, the plaintiff and his wife came to the shop of the defendant, and used abusive epithets towards him, such as cheat, rogue, &c., accusing him of an overcharge in his bill. The plaintiff's witnesses also deposed to abusive language on the part of the defendant. The passers-by were attracted by the noise, and a crowd of about a hundred persons assembled. The defendant requested the plaintiff and his wife to go away, and on their refusing, and still continuing their noise and abuse, he gave them into custody to a policeman, who took them before a magistrate, who warned and discharged them. It was admitted that the allegation of a riot in the plea could not be sustained; and the learned judge left it to the jury, directing them to throw the consideration of the riot out of the question, and merely to decide between the conflicting testimony of the witnesses. The jury having found a verdict for the defendant,

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*Crowder* now moved for a new trial, on the ground of misdirection.—No riot having been proved, the part of the plea which referred to that, cannot enter into the case; and the witnesses for the defendant did not support the allegation in the plea, by proving any breach of the peace. This ought to have been left to the jury, with a direction that the defendant was bound to prove that there had been a breach of the peace; and that having failed to do so, he could not recover on the pleadings. The case of *Timothy v. Simpson* (a) shews that it was incumbent on the defendant to prove all the allegations in his plea, which would amount to a justification. Moreover, the affray (if any) had ceased before the defendant put the officer in motion.

**LORD ABINGER, C. B.**—I think there was not any misdirection, and that the case made for the plaintiffs on this argument shews a breach of the peace. The uttering of abusive words, taken abstractedly, do not amount to a breach of the peace; but if the effect of such words is to attract numbers, and if such words are still continued to be used, and, as a consequence, further numbers are being attracted, there is nothing to shew the results to which it may lead. Such conduct, attended by such circumstances, in my judgment, amounts to a breach of the peace. The policeman, when called in, finds a hundred and fifty persons assembled about the door; he advises the plaintiffs to go away; they refuse. I think the policeman had then a right to take them into custody; and if the defendant ordered him so to do, I am of opinion that the defendant was justified, and this, too, within the authority of the case cited by Mr. *Crowder* himself. I find, on looking at the plea, that even after expunging the word *riot* altogether, there is sufficient left to justify all that has been done. If a man, when told to go away by a policeman, obeys the order and departs, I think the policeman has no right after that to apprehend him: if he does not go, however, when directed so to do, I think the policeman is justified in taking him before a magistrate, to be by him dealt with as the law shall direct. This may, perhaps, have been a slight case; still, as it amounts to a breach of the peace, in point of law, the defendant's plea is proved.

**PARKE, B.**—I am also of opinion, that there has been no misdirection; the plea is clearly good on the face of it; it states that a riot was going on at the

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time, and, if so, there was clearly a justification for the defendant, in having given one of the rioters into the custody of the policeman. On reverting to the evidence, however, there is no riot proved; it becomes material, therefore, to see if the word riot be struck out of the plea, and also all that relates to it, and to the obstruction to the plaintiff's shop, there remains sufficient to shew a breach of the peace, and I think there is. [His lordship here read the plea.] In *Coupey v. Henley* (b), C. J. Eyre says, that a constable may take a person into custody, when the constable interposes to prevent a breach of the peace. The plea sets out that the conduct of the plaintiffs "caused a large concourse and mob of persons to assemble;" that of itself is a public nuisance and obstruction of the highway; it goes on to allege, that the defendant acted in the manner he did *in order to preserve the peace*; the case of *Ingle v. Bell* (c) is an authority, that after verdict this is sufficient to shew that a breach of the peace had been committed; and in the present plea, I am of opinion that every thing shews a sufficient averment that a breach of the peace had been committed. Then it is to be seen whether the conduct described, of exciting antipathy against the defendant, and causing a mob of from one hundred to one hundred and fifty to assemble, is not a breach of the peace; and I am of opinion that it is such a breach as was sufficient to authorize the defendant to remove the parties, and take them before the magistrate.

BOLLAND and ALDERSON, Bs., concurred.

Rule refused.

(b) 1 Esp. 540.

(c) 1 M. & W. 516.

### PLUMMER v. LEIGH.

In debt on an award, the declaration stated, that there had been a submission to arbitration by the plaintiff, as administratrix of M. T., deceased, and

the defendant, concerning monies due by the defendant to the plaintiff, as such administratrix; and, in respect of a part of which monies, there had been a settlement in the lifetime of M. T., which was the last settlement previous to the award made pursuant to the said submission; and that arbitrator awarded a payment of 150*l.*, together with interest from the date of the said last-mentioned settlement, by the defendant to the plaintiff. The plaintiff pleaded, first, that the arbitrator did not make an award concerning the premises in the declaration, *modo et formâ*; secondly, that the day in the declaration mentioned in that behalf, was not the day of the last settlement; thirdly, that no such settlement, as in the declaration mentioned, was at any time made. *Held*, that the second issue was immaterial, and the jury having found it for the defendant, the Court awarded a repleader.

*Held*, also, that as there appeared to be no dispute between the parties, as to the day of the last settlement, the award was sufficiently certain.

Where there are several pleas on the record, and issues thereupon, and none of the pleas are in confession of the cause of action, the Court, if there be an immaterial issue raised on any plea, will grant a repleader, and not a judgment *non obstante veredicto*.

On a judgment of repleader, neither party is entitled to costs.

settlement, on a certain day in the lifetime of the said *M. Thompson*, to wit, on the 12th *July*, 1833, which settlement was the last settlement next before the making of the award hereinafter mentioned. And thereupon, for putting an end to the said differences, the plaintiff, as administratrix, as aforesaid, and the defendant, heretofore, to wit, on the 11th day of *June*, 1835, respectively submitted themselves to the award of one *John Plummer*, to be made between them, of and concerning said differences; and the plaintiff, in fact, saith that the said *John Plummer*, having notice thereof, and having taken upon himself the burthen of the said arbitrament, afterwards, on the 13th of *May*, 1836, made his certain award between the plaintiff, as administratrix, as aforesaid, and the defendant, of and upon the premises, and did thereby award that there was then due from the defendant to the plaintiff, as administratrix, as aforesaid, the whole sum of 150*l.*, together with interest on the same, from the period of the last-mentioned settlement, on payment of which a receipt in full was to be given, of which award the defendant afterwards, on the day and year last aforesaid, had notice; and although the plaintiff, as administratrix, as aforesaid, had always been willing to receive the said monies so awarded, and on payment to give a receipt in full to the defendant, yet the defendant had not paid the same, or any part thereof, but, on the contrary, the said 150*l.* and interest, as aforesaid, amounting in the whole to a large sum of money, to wit, 160*l.* 6*s.* 2*d.* were still wholly due to the plaintiff, as administratrix, as aforesaid.

*Pleas*—first, that the said arbitrator, *John Plummer*, did not make any award of and upon the premises in the said declaration mentioned, in manner and form, &c.; second, that the day in the declaration in that behalf mentioned, was not the day of the last settlement next before the making of the said award, in manner and form, &c.; third, that no such settlement, as in the declaration mentioned, was at any time made in manner and form, &c.

At the trial, before *Alderson*, B., at the sittings in *Hilary* term, the plaintiff had a verdict on the first and third issues; the defendant on the second.

*W. H. Watson*, on a subsequent day, obtained a rule *nisi* for judgment, *non obstante veredicto*, on the second issue, on the ground that it was immaterial; and *R. V. Richards*, for the defendant, had also obtained a rule *nisi* for a new trial, on the ground that the award was uncertain, in not specifically pointing out the day of the “last settlement” which the arbitrator had referred to. Both rules came on for argument together.

*Richards*, for defendant.—Admitting that the day is laid under a *videlicet*, yet, if the day is material, that circumstance is unimportant. Without an extrinsic averment, how can the defendant know the day of the last settlement? It is impossible for the defendant to pay money into court, or to know from what day the arbitrator means the interest to be paid, unless that day is specified. Is it not important that the precise day should be ascertained? Are we to judge for ourselves in computing the day, which we could not possibly know but from the award itself? Suppose we had traversed the fact of a settlement having been come to: this would not avail us; for we admit that a settlement was come to. The precise period is the only thing which can give the defendant a clue to the day on which the settlement was made. The arbitrator only says the interest is to be paid from the date of the last settlement: if they had not mentioned the date in their declaration, we might

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have demurred for uncertainty. This is a fact which could not be in the knowledge of any person but the arbitrator; and it is not enough to say, that the arbitrator might have been called; the arbitrator might have been dead (for instance) before the trial. An award must be certain, or capable of being rendered so; and that without the aid of extrinsic averments. *Cargey v. Aitchison (a)*.

The averment of time is material, as, without it, it is impossible the defendant could know whether any money was paid before action brought.

*Watson, contrà.*—The arbitrator having awarded a payment of money, and interest, since the last settlement, the date or time of the settlement is not material; a convenient certainty of time is all that is necessary in pleading; it is merely a substantial allegation in the declaration, and not matter of description; and, therefore, the *videlicet* shews that the time is immaterial. It never was heard in pleading, that if money was payable on a certain event, you were bound to state the day of the happening of the event. *Bennet v. Holbeach (b)*. [*Parke, B.*—It strikes me, that the allegation of time is quite immaterial. *Alderson, B.*—As to the objection, that it was impossible to pay money into court, the defendant might have demanded a particular.] Secondly, the award is sufficiently certain. It is said the arbitrator, in his award, should have shewn with certainty the day of the settlement; *id certum est quod certum reddi potest*. You may, by averment, aid such a deficiency as that. If a date may or may not be certain, the party objecting to the uncertainty must plead it. In *Beale v. Beale*, Roll. Ab. tit. *Arbitrement*, H. 14. This case is put:—"Si un submission soit de tous controversies, touchant un voiage al mere, et un obligation oue condicion pur performance de ces; et un agard est fait que l'un paiera son parte del charge del voiage, et allouera son proportionable parte del losse, que venera al niege per le voiage sur accompt; et agard ouster de l'autre parte, &c. Coment que cest agard soit de luy-mesme incerten, uncore en tant que pour estre reduce al un certentie, ceo est un bon agard." In what respect is the present case distinguishable in principle? It is another rule that nothing shall be intended against an award. The case of *Cargey v. Aitchison* clearly establishes this principle, and shews that such an objection, (if any,) on the score of uncertainty, must be pleaded. So *Harrison v. Liversege (c)*. In the present case a settlement of accounts was put in, and the arbitrator said it was a last settlement, and as such it was agreed upon. Suppose the case of a party awarded to pay from the death of an individual, this may be proved by allegation and evidence.

*Richards, contrà.*—This award cannot be supported; all matters in dispute are referred; and if all matters are not decided, we can take advantage of this defect, under a traverse of the award having been made *modo et formd.* Even putting the case at the other side of an award from the death of A. B.; it is submitted, such an award would be bad for uncertainty. The present award points to divers settlements; unless, therefore, the last settlement is defined, the award is bad. It is impossible to tell what was operating in the arbitrator's mind, as to the last settlement. The arbitrator himself was

(a) 2 B. & C. 170. S. C. on error,  
 2 Bing. 199.

(b) 2 Wms. Saund, 309.  
 (c) 2 Vent. 242.

the only person who could explain it; therefore, the award is not final; the defendant is, in truth, only purchasing one matter of controversy for another. If the arbitrator had referred to a fact that might have been ascertained *alimunde*, it would have been different. [Parke, B.—May not the award be good, as to the principal, though bad as to the interest?]

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The Court took time to consider, whether the proper course would not be to direct a repleader, instead of granting the application for entering up judgment *non obstante veredicto*; and, in the present term, judgment was delivered by

PARKE, B.—The first question to be disposed of is, the rule for a new trial.

This award appears to the Court to fall within the principle laid down in the case of *Cargay v. Aitchison* (*d*). It is not necessarily uncertain. If the time of the last settlement mentioned in the award was uncertain, or matter of dispute, the award would have been bad. We need not decide, whether that objection would have been open to the defendant on this plea; because, admitting that it was so, it appeared distinctly in proof that the time of the last settlement was certain, and was not a matter in dispute between the parties, but was mutually agreed on by both parties. We have no doubt, therefore, but that the award is good; and the first issue is properly found for the plaintiff.

The next question is, whether the second issue be immaterial, and what is the consequence if it be not?

We are clearly of opinion, that it was immaterial. The precise day of the last settlement was of no consequence, if a last settlement had been made in the lifetime of the intestate, and before the reference. If there had been no other plea on the record, the proper course would have been to award a repleader, and not to have given judgment *non obstante veredicto*. *Lacy v. Reynolds* (*e*), *Lambert v. Taylor* (*f*) That form of judgment proceeds on the confession in the plea, and the insufficiency of the avoidance; but in this plea, there is no confession on which judgment can be given: it raises an irrelevant issue, without any confession.

The next question to be considered is, whether a repleader ought to be awarded, as there is another proper issue raised and decided for the plaintiff on this record, on which, if it stood alone, the plaintiff would clearly be entitled to judgment. In the case of *Goodburn v. Bowman* (*g*), it is for the first time suggested, that if an immaterial issue be raised by one plea, and the cause of action is fully confessed or proved on another, in the same record, then the plaintiff is entitled to judgment on that confession or proof, and a repleader will not be awarded. But the present case is distinguishable from that; for here no plea contains a confession of any part of the cause of action, and there is no issue upon any plea, nor on all the pleas taken together, establishing the truth of the whole of it; and we are not aware of any precedent that a repleader can be granted as to part; consequently, as there can be no judgment on a confession, there must be a repleader, to save the

(*d*) 2 B. & C. 170.  
(*e*) Cro. Eliz. 215.

(*f*) 4 B. & C. 138. 2 Roll. Abr. 299.  
(*g*) 9 Bing. 532.



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expense of a formal judgment; the parties should amend, without costs on either side.

*Richards's* rule for a new trial was discharged, and leave was given to either party to amend, on payment of costs. It was also part of the rule, that if the defendant did not amend within a week, the plaintiff should be entitled to a judgment of repleader.

Neither party amended, and a judgment of repleader was accordingly awarded. The defendant then obtained a judge's order for a stay of proceedings, on payment of debt and costs. The master having, in taxation, allowed to the plaintiff the general costs of the cause, and of the first and third issues, and also the costs of the judgment of repleader.

*Richards* obtained a rule for the master to review his taxation, on the ground that on a judgment of repleader neither party was entitled to costs.

*Watson* shewed cause; and contended, that although before the rule of H. 2, W. 4, s. 74, neither party would have been entitled to the costs of a repleader, that under that rule the plaintiff would be entitled.

The Court were of a contrary opinion, coinciding in the judgment of the C. P., in *Goodburne v. Bowman*; and the rule for reviewing the taxation was accordingly made

Absolute.

### TEAGUE v. MORSE.

Declaration on a promissory note, whereby the defendant promised to pay the plaintiff 30*l.* 13*s.* 6*d.* by instalments of 2*l.* per month, until the whole was paid; with a proviso, that if any one instalment should be unpaid, the defendant promised to pay the whole sum of 30*l.* 13*s.* 6*d.* to the plaintiff, or his order on demand, or so much thereof, as should remain unpaid. The declaration contained an averment, that two defaults were made by the defendant, whereby the defendant became liable to pay the sum of 30*l.* 13*s.* 6*d.*, according to the tenor and effect of his note. General demurrer, assigning for cause, that on the default of payment of the instalments, the entire sum did not become payable without an express demand:—*Held*, that the instalments being clearly admitted to be due, the demurrer was too large.

THE declaration stated, that the defendant, on the 12th *March*, 1836, made his promissory note in writing, and thereby promised to pay the plaintiff 30*l.* 13*s.* 6*d.*, as follows, viz:—2*l.* on the 12th of *April*, and so on the 12th of each succeeding month, until the whole sum of 30*l.* 13*s.* 6*d.* was paid. The declaration then proceeded, "and that in case of default in payment of any one of the said instalments, then and in such case, the defendant promised to pay the plaintiff, or order on demand, the said sum of 30*l.* 13*s.* 6*d.*, or so much thereof as should remain unpaid." It then averred a delivery of the note to the plaintiff, and a promise by the defendant to pay the same according to the tenor and effect thereof; and that, on the 15th of *May*, default was made by the defendant in payment of two instalments, being the two first instalments, thereby made payable as aforesaid, whereby and according to the tenor and effect of the note, the defendant became liable to pay the sum of 30*l.* 13*s.* 6*d.*

*Breach*—that he had not paid.

*General Demurrer and Joinder.*

*Held*, that the instalments being clearly admitted to be due, the demurrer was too large.

*Richards*, in support of the demurrer.—The declaration is bad, as not containing any averment of a demand having been made on the defendant, although, the general rule is, that for any thing payable on demand, the bringing of the action is a sufficient demand, that does not hold good in the present case; and the reason is, that the demand here is a collateral matter. It is impossible, without such demand, to know whether the plaintiff brings his action for the whole sum, or for the instalments merely. When the default in payment of an instalment took place, the plaintiff was, no doubt, entitled either to bring his action for that instalment, or for the entire sum; but if he brings his action for the latter, he must aver an express demand in his declaration. In *Birks v. Trippet (a)*, it is laid down, that where, in assumpsit, the promise is, to pay a collateral sum on request, the declaration must aver an express request, and such request must have been actually made, otherwise the action is not maintainable. Applying that principle to the present case, the liability to pay the whole sum, on default of payment of the instalments is in the nature of a penalty, and is, therefore, collateral, inasmuch as if we had regularly paid the instalments, the claim for the entire sum could never have arisen.

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PARKER, B.—I think your first point is against you as, in the first instance, there was clearly a duty upon you to pay the entire sum. That, however, it is immaterial to consider, as the two instalments are admitted to be due; if so, there was a debt in respect of them, and so your demurrer is too large.

Judgment for the plaintiff.

(a) 1 Saund. 32.

### GOUGH v. WHITE.

**BAILEY** obtained a rule *nisi*, for judgment, as in case of a nonsuit in Hilary Term. Issue was joined in the vacation after Trinity Term; it was a town cause, and no notice of trial was given.

In a town cause, where issue has been joined in vacation, the defendant cannot move for judgment as in case of a nonsuit, until two actual terms have elapsed after issue joined.

*Heaton* shewed cause, and relied on *Heale v. Curtis (a)*, as shewing that the motion was premature. The new rules have altered the practice, as the proceedings in vacation have no longer relation back to the preceding term. The plaintiff, therefore, could not be guilty of a default until Easter Term.

*Bailey, contrd*, cited *Williams v. Edwards (b)*, *Hearle v. Wilson (c)*.

The Court having consulted the judges of the other courts in this term,

(a) 2 M. & Wels. 76.  
(b) 1 C. M. & R. 583.

(c) 3 D. P. C. 658.

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PARKE, B., delivered the judgment to this effect:—that judgment as in case of a nonsuit, could not be moved for until two actual terms have elapsed after issue joined.

Rule discharged.

### LEVI v. PRICE.

The new rules H. 2 W. 4. s. 83, and H. 4 W. 4. s. 9, do not apply to errors in fact. A writ of error *coram vobis*, operates as a *supersedeas*, from the time it issued out, and not from the time of allowance only.

The 6 Geo. 4, c. 96, s. 1, as to bail in error, does not apply to errors in fact.

**M**ANSEL, had obtained a rule for setting aside a *fi. fa.*, which had issued in this case, with costs, on the ground of irregularity. It appeared that a writ of error, *coram vobis*, was sued out in this case, on the 17th of *February*; notice of the writ was served on the opposite party, on the 22nd of *February*; and the writ was allowed on the 19th of *April*. Notice of the allowance was served on the 21st of *April*, and the execution was levied on the 19th, before the allowance of the writ.

*Humphrey* shewed cause.—By the 83 Rule H. 2. W. 4., a writ of error is only to be deemed a *supersedeas* from the time of allowance; and by Rule 9, H. W. 4., “no writ of error shall be a *supersedeas*, until service of the notice of the allowance thereof, containing a statement of some particular ground of error intended to be argued.” It is clear, therefore, that the plaintiff was entitled to proceed until the writ of error was allowed, and the notice of allowance was served on him; besides, under the 6 Geo. 4, c. 96, s. 1, the defendant ought to have put in bail in error.

PARKE, B.—The statute of James does not apply to error *coram vobis*; this was decided in *Birch v. Triste* (a); and the latter statute of Geo. 4, is *in pari materia*; you ought, therefore, to have applied to the Court before you issued execution. The rules of court you have cited, do not apply to error in fact.

Rule absolute.

It was also made part of the rule, that no action should be brought.

(a) 8 East, 415.

## THE ATTORNEY-GENERAL v. HANDCOCK and another.

*Exchequer.*

THIS was an information filed by his majesty's attorney-general against the defendants, to recover the sum of 560*l.*, for legacy-duties, under the 55 Geo. 3, c. 184, sched. part 3, tit. Legacy.

The first count of the information stated, "That *Samuel Malbon*, theretore, to wit, on the 19th day of *May*, in the year of our Lord 1790, in the county of *Middlesex*, in his lifetime, made his last will and testament, in writing, and signed by him, and attested and subscribed, &c. And the said testator thereby appointed Dr. *William Vivian* and Dr. *William Malbon*, then and therein called Dr. *William Gorst*, executors of his said will; and also thereby, amongst other things, gave, devised, and bequeathed all the rest and residue of his goods and chattels and personal estate, (from and after payment of his just debts, funeral and testamentary expenses, and certain legacies and annuities in the said will particularly mentioned,) as also all such real estates as he was seised of as mortgagee in fee, unto his said executors, their heirs, executors, &c., upon trust, to convert the whole of the said residue of his personal estate into money, and to lay out and invest the same, as conveniently might be, in one or more purchase or purchases of freehold lands, tenements, or hereditaments in the said will mentioned and described to be conveyed to the said *William Vivian* and *James Morrell*, their heirs and assigns, to, for, and upon certain uses and trusts, and subject to certain provisoes and powers in the said will also particularly mentioned. And the said testator thereby directed, that, until such purchases were made, his said executors should place out at interest all the said residue of his personal estate out at interest, in the names of the said executors, on mortgage of real estate, or, if the same should not offer, that the said residue should be placed out at interest in the public funds, and that the clear yearly interest thereof should, from time to time, be paid to and received by such person or persons to whom the rents and profits of the real estate therewith to be purchased, would, for the time being, belong, by virtue of his said will, as by the said will, reference being thereunto had, might more fully appear."

The information then went to aver, that the said testator died on the 30th of *April*, 1791, without revoking his will, and that the said *William Vivian* and *William Malbon*, afterwards, and after the death of the testator, on the 6th of *May*, 1791, took upon themselves the burden of the execution of the said will; and that, afterwards, on the 1st day of *January*, 1825, *Vivian* died, leaving the said *William Malbon* him surviving; and that, after the death of *Vivian*, *William Malbon* made his will, and appointed the defendants his executor; and that *Malbon* afterwards died, on the 11th of *December*, 1826, without revoking his will; and that, after his death, the defendants took upon themselves the execution of the will of the said *Samuel Malbon* and *William Malbon* respectively.

It then proceeded to state, that the defendants, having so taken upon them-

A testator, by his will, which took effect in 1791, devised the residue of his personal estate, (after the payment of his just debts and legacies,) as also the real estates of which he was seised as mortgagee in fee, to trustees, upon trust, to convert the whole into money, and lay it out in the purchase of real estate, to be conveyed to the same trustees, to and upon the same uses and trusts as were therein before declared concerning his real estate. The will also directed, that, until such real estate was purchased, W. V. and W. M., the executors, should lay out the residue, at interest, on mortgage of real estate, in their own names; or, if such could not be procured, then at interest in the public funds; and the dividends and interest were directed to be paid to the parties who would, under his will, be entitled to the profits of the real estates so directed to be purchased. The executors took upon themselves the burden of the

will, and, in the year 1792, and before the passing of the 36 Geo. 3, c. 82, invested the residue, which amounted to 14,000*l.*, on mortgage. W. V. died, leaving W. M. the surviving executor. W. M. died in 1825, and appointed the defendants his executors. The money had never been laid out in the purchase of real estate. A suit was instituted, in order to ascertain the right heir of the original testator; and, upon his being ascertained, the defendants, as executors, paid over to him the residue of the personal estate. Held, that this was a legacy, given by the will of a person dying before the 5th of *April*, 1805, and paid, satisfied, or discharged after the 31st of *August*, 1815, within the 55 Geo. 3, c. 184, and was liable to the payment of a legacy-duty under that act.

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selves the execution, afterwards, and after the 31st day of *August*, 1815, to wit, in the year 1832, the residue of the personal estate of *Samuel Malbon*, after payment of his just debts, &c. amounted to 14,000*l.*; and that the same, nor any part thereof, had not been applied in the purchase of any real estate; and that, after the said 31st day of *August*, 1815, to wit, in the year 1832, they, the said defendants, paid and satisfied the said residue of the personal estate of the said *Samuel Malbon*, so being of the value aforesaid, to one *John Malbon*, (the said *John Malbon* being entitled under the will of the said *Samuel* to the said residue,) without having received or deducted the duty chargeable upon the said residue; and that the said *John Malbon* was a descendant of a brother of the father of the said testator, *Samuel Malbon*; and that the duty which, according to the statute in that case made and provided, ought to have been paid for the said legacy, amounted to 560*l.*, which said duty is still due and unpaid to his said majesty. Whereby, &c.

There were other counts, which it is unnecessary to set out.

*Breach*—That the defendants, contriving, &c., had not paid.

The defendants pleaded to the first count a plea, in which, after stating that the testator, *Samuel Malbon*, had devised all his estates in *Cheshire* and *Staffordshire*, and all his other real estates, except mortgages, in fee, to the said *William Vivian* and one *James Morrell*, as trustees, to the use of Dr. *William Gorst*, for life; remainder to trustees, to preserve contingent remainders; remainder to the use of the first and every other son of the said *William Gorst*; remainder to the use of *Ralph Malbon* the younger, for life; remainder to trustees, to preserve, &c.; remainder to the first and other sons of *Ralph Malbon* the younger; remainder to the use of *Samuel Malbon*, the brother of the said *Ralph Malbon*, for life; remainder to trustees to preserve, &c.; remainder to the first and every other son of the said *Samuel*; remainder to the use of the testator's right heirs for ever. After setting out certain other portions of the will, the plea went on to state, that the said testator, by his will, bequeathed, (as set out in the declaration,) the residue of his personal estate to *Vivian* and *Gorst*, to convert the whole of the said residue into money, and to lay it out in the purchase of freehold lands in *Cheshire* or *Staffordshire*, to be conveyed to the said before-mentioned trustees, to the same uses as the real estates. The plea then sets out that part of the will which directs the monies arising from the sale of the personalty to be laid out on mortgage, or in the funds, (as already set forth in the declaration,) and then proceeds: "and from time to time to call in and receive the monies so put or placed out, or to sell and dispose of the money in the funds, or any part thereof, in manner aforesaid, as often as there should be occasion, and they think fit, subject to the trusts aforesaid. And the said *Samuel Malbon*, by his said will, directed that, in the mean time, and until the residue of his personal estate should be laid out in such purchase or purchases, the clear yearly interest or produce that should be made thereof, should, from time to time, be paid to and received by such person, &c., as the profits of the estate or estates to be purchased, (if purchased,) would, for the time being, belong, by virtue of his said will." The plea next states the appointment of *Vivian* and *Gorst* as executors, afterwards, and before the passing of the 36 Geo. 3, c. 52, the death of the testator; the execution of the will by the executors, and then goes on: "And the said defendants further say, that the said *William Malbon*, being interested, under and by virtue of the said will of the said *Samuel Malbon* as aforesaid, in the said

residue of the personal estate, for his, the said *William Malbon's*, own use and benefit; and the said *William Vivian*, at the request, and for the use and benefit, and on the account of the said *William Malbon*, afterwards, and before the 31st day of *August*, 1815, to wit, on the 11th day of *August*, 1792, put and placed out, in their names, on mortgage of real estate, a large sum of money, to wit, the sum of 7000*l.*, parcel of such residue as last aforesaid, by lending the same to one *Brooke*, on the mortgage of certain lands in the county of *Chester*, which were, before the 31st day of *August*, in the year of our Lord 1815, conveyed to the said *William Malbon* and *William Vivian*." The plea then sets out the mortgage by *Brooke* to *Mulbon* and *Vivian*, for the sum of 7000*l.*, at 4 per cent., and afterwards of a further sum of 7000*l.*, at the like interest; which two sums, amounting to 14,000*l.*, were the residue in question. The plea then avers the death of *Vivian*, leaving *Malbon* as surviving executor; the payment of interest to *Malbon* up to the time of his death; the will of *Malbon*, appointing the defendants his executors, and his death; that the defendants took upon themselves the execution of the wills of *Samuel Malbon* and *William Malbon* respectively: and the plea then proceeds: "And the said defendants further say, that, by the said putting and placing of the said sums of 700 *l.* out at interest, as aforesaid, and lending and advancing the same respectively, as aforesaid, and the receipt and payment, as aforesaid, of such interest, as aforesaid, according to the said will of the said *Samuel Malbon* in that behalf, the said sums of 7000*l.*, became and were paid, appropriated satisfied, and discharged, before the 31st day of *August*, in the year of our Lord 1815. And the said defendants further say, that, for the use and benefit, and at the request and on the account of the said *John Malbon*, they received the said sums of money which were so lent and advanced upon mortgage as aforesaid, being the said residue, in the said first count mentioned, of the said personal estate of the said *Samuel Malbon*, and paid and satisfied the same to the said *John Malbon*, being entitled, as in the said first count mentioned, and being also such descendant, as therein mentioned; and this the said defendants are ready to verify, &c.


*Demurrer and joinder.*

The following were the points relied upon by the Crown, viz. that the duty is payable under the 36 Geo. 3, c. 52, s. 19; 44 Geo. 3, c. 98, s. 12; and 55 Geo. 3, c. 184, sched., part 3, tit. Legacy; and that the residue of *Samuel Malbon's* personal estate is not shewn by the plea to have been paid, satisfied, or discharged before the 31st of *August*, 1815.

The defendants relied upon this, viz. that personal estate, directed to be invested in land, was not liable to legacy-duty before the 36 Geo. 3, c. 52; and that, the testator having died in 1791, there was nothing retrospective in that act to attach upon the testator's property; and, also, that the laying out on mortgage was an appropriation before the 31st of *August*, 1815.


*Rolfe*, S. G., for the Crown.—The question will be, whether this was a "legacy, paid, appropriated, satisfied, and discharged," before the 31st *August*, 1815. The 55 Geo. 3, c. 184, sched. 3, repeals all former duties, and regulates the imposition of new duties as follows:—"Legacies or successions to personal or moveable estate upon intestacy.—I. Where the testator, testatrix, or in-

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testate died before or upon the 5th of *April*, 1805. For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will or testamentary instrument of any person who died before or upon the 5th day of *April*, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, satisfied, or discharged after the 31st day of *August*, 1815; also for the clear residue, (when devolving to one person,) and for every share of the clear residue, (when devolving to two or more persons,) of the personal or moveable estate of any person who died before or upon the 5th day of *April*, 1805, (after deducting debts, funeral expenses, legacies, and other charges first payable thereout,) whether the title to such residue, or any share thereof, shall accrue by virtue of any testamentary disposition, or upon a partial or total intestacy; where such residue, or share of residue, shall be of the value of 20*l.* or upwards, and where the same shall be paid, delivered, retained, satisfied, or discharged after the 31st day of *August*, 1815." It then specifies the duties, according to the degree of relationship; and the amount of duty applicable in the present case, under this schedule, is a duty of 4*l.* per cent. It is admitted that the testator died before the 5th of *April*, 1805; so that all that remains to be seen is, whether this is a clear residue accruing by virtue of a testamentary disposition, paid, delivered, retained, satisfied, or discharged after the 31st of *August*, 1815. It will be material to the proper understanding of this question, to call attention to the several acts imposing and regulating the payment of legacy duties. The first statute was the 20 Geo. 3, c. 28, which imposed a duty of 2*s.* 6*d.* on every piece of paper or parchment on which any receipt for any legacy should be given. The next statute was the 23 Geo. 3, c. 58, by which it was enacted, that, from and after the 1st day of *August*, there should be levied, collected, and paid, the several stamp-duties following, viz. "For every skin of parchment, or sheet or piece of paper, upon which shall be engrossed, written, or printed, any receipt or discharge for any legacy left by any will, or for any share of personal estate, divided by force of the Statute of Distributions, the amount whereof shall not exceed the value of 20*l.*, an additional stamp-duty of 5*s.*; and where the amount shall be of the value of 100*l.*, an additional stamp-duty of 20*s.*; and a like additional stamp-duty upon every further sum of 100*l.* The next act was the 39 Geo. 3, c. 51, which imposed an additional stamp-duty upon receipts for legacies. Parties were in the habit of evading the payment of the duties by not taking a receipt; and in order to prevent this evasion, it was determined to impose the duty, not on the receipt, but on the legacy itself. With this view, the 36 Geo. 3, c. 52, was passed; and that statute, for many purposes, still regulates the payment of legacy-duty. The first section of that statute enacts, that the duties imposed by those several before-mentioned acts on receipts for legacies and for shares of residue, upon which any duty should be imposed by the present act, should cease; and it consequently repeals so much of the former acts as refers to the repealed duties. It therefore will be seen, that the 36 Geo. 3, c. 52, only repeals so much of the former acts as was incompatible with the duties imposed by that act. The second section then enacts, that, in respect of legacies of the value of 20*l.* or upwards, as also in respect of the residue of personal estates, that duties therein specified shall be imposed, which shall attach upon the legacy or residue, and not upon the receipt or discharge for the same. This section applied only to legacies given by persons dying after the passing of the act. The

action, however, is very important. "It first directs, that money or personal estate, directed to be applied to the purchase of real estate, shall pay duty at persons in succession; and then each person entitled in succession pay duty for the same, unless the same shall be actually laid out in the use of real estate before the duty accrued; but there shall be no duty in respect thereof after its employment in the purchase of real estate. It is then a proviso, that, in case, before the same or part thereof shall be applied to the purchase of real estate, any person shall have become entitled to the real estate in possession in the real estate to be purchased with, the same duty shall be paid which ought to be paid by such person, out of the fund remaining to be applied to such purchase." This may fairly be construed not as exempting from duty in a case where there was no exemption before this clause, but as relieving parties entitled to a duty to be laid out in land, in succession, from the payment of duty, provided it was so laid out before the duty attached. The statute also directs in the manner the duty shall be paid by parties entitled in succession; and there are no provisions directing that such parties shall pay as annuitants for the term which they are to receive, until the money is actually invested in the use of land. One entire duty is ordered to be charged at once, as on a legacy, where the parties entitled to take in succession are all in the same degree of relationship; where, in different degrees, each is to be treated as an annuitant. Let us suppose, for a moment, that a sum of money, directed to be laid out in the purchase of real estate, were given to a wife for life, remainder over to a stranger in blood; the wife, not being liable to duty, would require that the entire sum should be laid out in the purchase of real estate; unless this clause were in the act, there would be no means of enforcing the payment of duty as against the stranger. In order to avoid this difficulty, the legislature provided, that, until the money was laid out, the person taking in succession should pay as annuitants for the amount which they were to receive; and that, when so laid out, the duty would cease to be payable, with this exception, that, if it was not so laid out until it came to a party entitled to an estate of inheritance, then that the surplus of the legacy should be applied to the duty. This was the state of the law from the 26th of April, until the year 1804, when, by the act 44 Geo. 3, c. 98, all the existing duties were repealed, and new ones imposed, and set out in the schedule to the act. In that act there was one material clause, which was important at that point, whether the legislature intended to give a retrospective effect to the act of 1796. After the passing of the latter act, there were two distinct duties still payable, viz., the duties under the old acts, where the testator had died before this act, and the duties payable in respect of legacies after this act. The 12th section of the 44 Geo. 3, c. 98, recites the acts imposing duties on receipts, and enacts, "that the said duties on legacies, given or bequeathed by, or derived from, persons who died previous to the 27th of April, 1796, shall be and remain payable, &c., to the use of his majesty for two years next after the 10th of October, 1804, and that, from the expiration of two years next after that date, every receipt, &c., in respect of any legacy derived from any person whatsoever, dying previous to or since the 27th of April, 1796, shall be subject to duties set forth in the schedule to the new act." This clause is

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material, as shewing what the legislature thought it fair to parties whose testator died before 1796, to give them time to relieve themselves from the new duties, if they could do so. The next act was the 45 Geo. 3, c. 28. That act is not material to the present argument. It was the first act imposing the same duties on legacies charged on real estate as were previously payable on personal estate, and was also the first act imposing legacy duties on children of a testator. It had, however, no retrospective operation. The next act, 48 Geo. 3, c. 109, only raised the duty on legacies to strangers. The next act was the 55 Geo. 3, c. 184, the act at present in force, which enacted a set of new duties set forth in the schedule, and repealed the then existing ones. That schedule sets forth, "that, where the testator, testatrix, or intestate died before or upon the 5th of *April*, 1805, and the legacy shall be paid, retained, satisfied, or discharged after the 31st day of *August*, 1815, certain duties shall be paid; and the duty in the present case, under that schedule, would be four per cent. In the case, however, of a person in the same degree as the present legatee, where the testator died on or after the 5th day of *April*, 1805, a duty would be payable of 5*l.* per cent. This part of the schedule is material, as it clearly has a retrospective effect. Although the act was to come into operation on the 31st day of *August*, 1815, it was to apply to legacies given by parties dying after the 5th of *April*, 1805. It may be objected, that the legislature would not be so unreasonable as to impose a duty upon a legacy payable in 1791, which would not have attached, if the duty had been paid in that year. The answer is, that the legislature, throughout these acts, shew, that they contemplate a retrospective operation. Having, therefore, cleared away all preliminary matters, we come back to the original question,—is this a legacy paid, delivered, satisfied, or discharged after the 31st day of *August*, 1815? [It is unnecessary to follow the argument, as the judgment turns altogether upon what is already set out. The solicitor-general cited *Attorney-General v. Mannors* (a), *Hill v. Atkinson* (b), *Attorney-General v. Wood* (c), *Attorney-General v. Hope* (d), *Coombe v. Triste*.

*Kelly, contrà.*—The duties, claimed by the Crown are not payable by law. The question, whether there has been an appropriation, is a secondary question. The principal question is, whether, by any statute passed since the 36 Geo. 3, an *ex post facto* operation is given to that act. The proposition for which the defendants contend is, that the duties now claimed were, for the first time, made payable by the 36 Geo. 3, and that there is nothing retrospective in that act, nor is it made so by any of the subsequent acts, so as to include legacies given before 1796. If the defendant shall be enabled to shew, that, if these duties had been claimed in 1797, they would not have been recoverable; then nothing since that time has occurred to make them so, even admitting, that the recent acts are retrospective, as increasing the quantum of the previous duties.

The testator died in 1791, having, by his will, appointed two executors and one legatee. He devised several real estates, and also his personal estates, with directions that the proceeds should be invested in land, subject to the same trusts as had been previously directed as to his real estates; and, in the

(a) 1 Price, 411.


(b) 2 Meriv. 45; 3 Price, 399, 6. C.

(c) 2 Y. & J. 290.

(d) 1 C. M. & R. 530.

meantime, to be laid out on mortgage; and, until so laid out, to be invested in the funds. The residuary personal estate amounted to 14,000*l*. The investment under the trusts of the will was not made; however, there was an investment on mortgage by *Gorst Malbon*, for his own use and benefit. He received the rents and profits under this mortgage, to his own use, until his death, in 1815, after the 55 Geo. 3 came into operation. A suit then took place, in order to ascertain who was the heir at law; and, that having been ascertained, and the money having been paid to him, the question now arises, is he liable to a duty of four per cent. Three statutes passed before the year 1796, as already stated, affecting duties on legacies. In the year 1796, however, the first direct duty, *eo nomine*, was imposed upon legacies. This statute made several important alterations. The first alteration was by the 1st and 2nd sections. The most important alterations, as distinguished from all the others, is, that higher duties were imposed, and these larger duties only applied to persons dying after the passing of that act. There were, therefore, two classes of duties; one of larger amount, applying to legacies given subsequently to 1796: one minor in amount, chargeable in respect of legacies of persons dying before 1796. There was also another important change in the law, viz., the higher duties were made payable on the legacies, and not upon receipts; and here, again, the 36 Geo. 3, is *not* retrospective. The third is the important alteration, and the one which affects the present case. Before the 36 Geo. 3, money directed to be laid out in land was not directly or indirectly liable to duty, until the 19th section of that act imposed the duties. Another alteration was, that executors, who were not liable where the money was paid to themselves or legatees, by the 6th section were made liable to pay duties like ordinary persons.

The 25th section also imposes a new duty on money paid into the Court of Chancery. Up to this time no retrospective operation is given by the 36 Geo. 3. The next change of the law was the 44 Geo. 3. The first question will be, is there a retrospective operation throughout the whole of the provisions of this statute, given to the 36 Geo. 3?—or whether any greater effect is to be given to the 44 Geo. 3, than this, viz., that for two years parties claiming under wills in operation before 1796, were to pay precisely the same duties? and it is submitted, that this act was retrospective *only* as to the amount of duties, and that it did not make parties, claiming under wills previous to 1796, liable, who were not made liable by 36 Geo. 3. Suppose a person liable, before 1796, to pay 5 per cent. duty, and 6 per cent. after 1796; under these circumstances, if he obtained payment of his legacy before the expiration of two years, he would pay the old duties, and this was the effect of the 44 Geo. 3. There is nothing, however, in this act which makes any subject-matter not liable to duty before 1796, now liable under the latter act. The 44 Geo. 3, for the period of two years from its passing, operated to increase and equalize the duties, and that was all. Next came the 45 Geo. 3. This statute is extremely material, not only as increasing the duties, but as imposing a duty on persons not before liable, viz., children. Then comes the 55 Geo. 3. It is contended that, provided the money is payable after 1815, that is sufficient to make the duties payable in respect of such legacy, no matter when the will first took effect by the testator's death. The answer to that is, that the only effect of the 55 Geo. 3, is to increase the duties, making a distinction between duties payable before and after 1805. If this act, as contended for, applies to

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all legacies given before 1805, it would, by a parity of reasoning, apply to children, whose parents died before 1805. It would be an extremely hard case, if a parent died in 1805, and the legacy was not paid until after 1815, that such children would be liable to a duty. [*Parke, B.*—The solicitor-general's argument involves this consequence. *Rolfe.*—No: the act itself says that 55 Geo. 3, imposes no duty on a child, if the parent died before 1805; however, if that exemption was not in the statute, such a consequence would certainly follow.] Although it is quite true that the statute is retrospective in its effect, as to increasing the duties, still there are no clear and unequivocal words to give this act an *ex post facto* operation, as to the subject-matter of money to be laid out in land. Suppose a legatee had sold his ultimate vested reversion between 1791 and 1796, it would be a great hardship on a purchaser who took the land on the faith of the then law, to have a payment of duty imposed upon him by an *ex post facto* enactment. It is submitted, that it was not merely by the *indirect* implication, arising from the fact that no receipt was given for money directed to be laid out in land, that such money was exempted from legacy duty. In the case of the *Attorney-General v. Holford (d)*, it was held, "that a bequest of real property to trustees, to be sold, and part of the profits to be deemed part of the residue of the testator's estate, or go in aid, if necessary, of the rest of his pecuniary legacies, given either by his will or any codicil thereto, was liable to the legacy duty imposed by the 48 Geo. 3, c. 149, although the residuary legatee took the property in *statu quo*, and the trustees did not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary. The subject of such a bequest would be considered as personal property in equity, and would go, in case of the legatee's death, to personal representatives. That is precisely the converse of what the present case would have been before 1796. In that case the question was, whether the land was liable to the payment of the legacy duty, under the 44 Geo. 3; and the Court held it was; and for this reason, viz., that it was a devise of land to be applied as personalty. Here, however, it is a devise of money to be laid out in land, which equity would consider as land. *Thompson, C. B.*, in delivering his judgment, puts a case in *pari materid* with the present:—"Suppose a sum of money were bequeathed to be laid out in land, is such a legacy provided for by the act? That would certainly be deemed, in equity, land, not money." [*Parke, B.*—If I understand that decision right, it is this: if a party takes the legacy in the shape of land, instead of money, he shall still be liable to the duty, under the 44 Geo. 3.] Before the 36 Geo. 3, money directed to be laid out in land, would have been considered, in equity, as land. But, without referring to any authority, it is only necessary to look to the 36 Geo. 3, s. 19, which enacts, "that any sum of money, or personal estate, directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate." Then comes the proviso, "unless the same be so given as to be enjoyed by different persons in succession; and then each person, entitled thereto in succession, shall pay duty for the same, in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually employed in the purchase of real estate, before such duty accrued; but no such duty shall accrue in

respect thereof, after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so employed."

On what principle can it be said, that money directed to be laid out in land was liable to duty before this act? Are we to suppose that the legislature, at the time they passed the acts as to receipts, did contemplate the contingency, that, money directed to be laid out in land, might be paid directly in money by the executor to the legatee? As money directed to be laid out in land is generally made the subject of strict settlement, if the legislature meant it, they would have pointed it out specifically. This not being so, it is plain this duty was never imposed until the passing of the 36 Geo. 3. If, then, until this express provision, there was no act imposing a duty on money directed to be laid out in land, how can it be said this act is retrospective? If a claim had been made when the only statute in existence was 36 Geo. 3, could it be said such a duty would be payable, that act not providing for any retrospective operation?

We now come to the 44 Geo. 3. At the time of the passing of that act, there were three different classes of cases; these have already been pointed out: the third, however, is important here, as regarding money directed to be laid out in land, which it is submitted was altogether untouched by the act of 1804. The 12th section of the 44 Geo. 3, provides, "that whereas certain duties are charged upon receipts or other discharges, for or in respect of legacies given or bequeathed by, or derived from, persons who died previous to the 27th day of *April*, 1796, for and during the term of two years, from the 10th day of *October*, 1804, be it therefore enacted, that the said duties on legacies, (viz., those under the three former acts,) given or bequeathed by, or derived from, persons who died previous to the 27th day of *April*, 1796, shall be and remain payable, and shall be paid, to and for the use of his majesty, &c., for and during the same term of two years from and after the said 10th day of *October*, 1804, any thing in this act, &c., notwithstanding; and that, from and after the expiration of two years from the 10th day of *October*, 1804, every such receipt, &c., for any legacy, &c., whether the person giving the same shall have died previous to or since the 27th of *April*, 1796, shall be, &c., subject to the receipts, &c., for legacies mentioned, &c., in the schedule hereunto annexed." The above section only relates to the 20, 23, and 29 Geo. 3. Here, then, the question arises, is this not a provision affecting only the amounts of duties previously payable?—or is it one making things liable to duty which were not so before? It is submitted that the legislature, in effect, says this, "We give to persons two years to collect their legacies, subject to the old duties." If the act of 1805, imposing duties on children, had passed in 1800, could the 55 Geo. 3, have made children liable to duty? It is confidently contended it would not; the terms of the act are equally wide, however, to include the one case as well as the other. The recital of the three acts operating down to 1796, therefore, shews that the act of 1804 only extends to the *quantum* of duties already existing, and not to the imposition of new duties not before established. Of all the cases cited at the other side, *Hill v. Atkinson* (h) alone applies to this branch of the argument. The sum of the argument, therefore, is, that without express words a tax will not be imposed; and that the fair construction of these acts is an extension of

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(h) 3 Price, 339; 2 Meriv. 45, S. C.

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duties already imposed, and not a creation of duties which had previous existence. [The argument on the appropriation is omitted for the reason already given.]

*Rolfe*, S. G., in reply.—If the act is retrospective in augmenting duties already in existence, there can be no greater hardship in holding it to be retrospective in imposing duties where none previously existed; and it is admitted that the act is retrospective in subjecting legacies unpaid at the time it took effect to higher duties. In *Hill v. Atkinson*, if the legacy had been paid on the testator's death, it would not have been liable to any duty. It is a matter of very strong doubt, whether money directed to be laid out in land would not not be liable before 1796. Suppose a party, before 1796, who was entitled to money directed to be laid out in land, had asked for the money, and it had been paid to him, could a receipt for that money, in exoneration of the executors, be given in evidence without a legacy-stamp? Certainly not. The appropriation directed by the will, does not make it cease to be a legacy. If the money had been given for the purpose of binding a party apprentice, would it not still be a legacy? Put this case: if, before 1796, a testator had given 10,000*l.* to A. B. and C. D., *nominatim*, not as executors, but as trustees, to lay it out in land to be settled in some particular manner, it will not be said that the trustees would not be bound to give a receipt to the executors, upon the payment of the money, if this had occurred before 1796. The statute of 1796 passes; so does the statute of 1804; the latter directing the duties under the 20, 23, and 29 Geo. 3, to cease after *October*, 1806; the money is not paid over until after *October*, 1806, what is the duty payable? If this act has not a retrospective operation, it would not be liable at all; because the duties under the three former acts were repealed; and if the meaning of the new acts was not to revive all previous liabilities, the right to the duty is altogether gone. This could hardly be supposed to have been the intention of the legislature.

*Cur. adv. vult.*

On a subsequent day, Lord ABINGER, C. B., delivered the judgment of the Court. His lordship, after stating the facts of the case, concluding with the circumstance that the executors had, in the year 1832, paid over the residue to *John Malbon*, as the person entitled under the will, then proceeded.—The question arises upon the application of these facts, to the act of the 55 Geo. 3, c. 184. The third part of the schedule to that act contains these words, "Where the testator or intestate died before or upon the 5th of *April*, 1805, for every legacy, &c., of the amount or value of 20*l.* or upwards, given by the will of any person who died before the 5th of *April*, 1805, out of his personal or moveable estate, and which shall be paid, delivered, satisfied, retained, or discharged, after the 31st of *August*, 1815; and for the clear residue, &c., of the personal estate of any person who died before the 5th of *April*, 1805, when the same shall be paid, &c., after the 31st of *August*, 1815," a certain amount of duty not material to be specified.

It is plain the testator died before the 5th of *April*, 1805; it is admitted, by the pleadings, that the clear residue of his personal estate was paid and satisfied by the defendants to *John Malbon*, after the 31st day of *August*, 1815.

Unless, therefore, all the acts *in pari materid* shew that this is an excepted case, it falls within the precise words of the schedule.

It was argued that the clear residue was paid to the party entitled, before any of the acts imposing the duty were in existence, viz., in 1793. If *William Gorst*, the first taker, alone had been entitled to this residue, that might be true; as it might appear that the legacy had been applied to his use before the statutes existed. The will, however, contemplates the devolution of this residue on a succession of persons, before its being laid out in land; and the executors are directed to keep it in their own control, until it is laid out in land; and it moreover appears, that it never has been so laid out, but that it has been paid to the party entitled under the will, as personal estate, in the year 1832. It, therefore, was within the words of the 55 Geo. 3, c. 184, sched. part 3, tit. Legacy, as well in its form as its time of payment.

Even supposing that a legacy coming to several persons in succession, under the directions of a will, can be said to be paid and satisfied to each in turn, the words of the schedule and of the stat. 36 Geo. 3, may apply to the last of these payments, if made after the 31st day of *August*, 1815, although other payments may have taken place before. As it is admitted that the payment and discharges did not take place until 1832, it is unnecessary to consider the question of what shall be deemed an appropriation.

It was principally contended by the defendant, that the 55 Geo. 3, c. 184, was retrospective, as to the rates of duties payable under former acts by parties dying before *April*, 1805; but that it was not retrospective, so as to impose a duty where none existed under any statute in operation, before *April*, 1805. This distinction, however, does not exist. Even in the 36 G. 3, c. 52, which imposes duties upon legacies, and not upon receipts, as theretofore, and the 45 G. 3, c. 28, imposing duties for the first time upon legacies charged upon land, are clauses giving both the acts a prospective operation only; and their retrospective operation is derived from the schedules to general stamp acts.

The 44 G. 3, c. 98, s. 12, continued for two years only, the duties payable upon receipts before the 36 G. 3; the schedule to the same act imposed retrospectively the new duties, after those two years, upon legacies where the testators died before the 5th of *April*, 1805, and the legacies should not be paid until after those two years; and the schedule to the 55 Geo. 3, c. 184, charges retrospectively the duties in existence at the passing of that act, on all legacies given by persons dying before *April*, 1805, and not paid until after the 31st of *August*, 1815. However long a time, therefore, the legacies may have been vested in interest, if not reduced into possession before the 31st of *August*, 1815, the legatee is still liable.

It was insisted, in argument, that legacies directed to be laid out in land were distinguishable from other legacies, as equity would consider them to be land; and it was said, moreover, that the 36 Geo. 3, which first imposed duties on such legacies, was prospective only. This distinction does not exist. Wherever a receipt for a legacy to be laid out in land was given, such receipt was equally liable to duty with any other. The 36 Geo. 3, does not impose a duty on legacies to be laid out in land, any more than upon mere personal legacies. All that it does is to make both the one class and the other liable to duties, independent of the stamp-duties on receipts; and it also makes the

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taking of the receipts for both imperative under a penalty; rendering both executor and legatee for the first time accountable for both. The legacies which are directed to be laid out in land, are no more exempted from the retrospective operation of the schedule than legacies of personalty: and, therefore, we are of opinion that judgment must be entered for the Crown upon this demurrer.

DOIDGE v. ELIZABETH BOWERS, R. W. MUNN, and  
 MARY ANN his Wife, and HENRY BOWERS.

A., B., and C., before the marriage of C., entered into an agreement, dated the 25th December, 1834, to rent a house of the plaintiff for seven years. This agreement was never signed by the plaintiff. In September, 1835, C. married, and, in the following December, A. became bankrupt. The defendants proved payment by A.'s Assignees of the quarter's rent, due at Michaelmas, and that the plaintiff had admitted the receipt of the two previous quarters, but it did not appear when or by whom these latter payments were made:—*Held*, that there was no evidence from which a yearly tenancy could be inferred, so as to charge all the defendants, as it was not shewn that the payments were made before C.'s marriage, or with her assent after her marriage.

THE first count in the declaration stated, that the defendants, *Elizabeth Bowers, Mary Anne Munn*, and *H. Bowers*, while the said *Mary Anne* was unmarried, to wit, on the 14th September, 1835, were indebted to the plaintiff in 300*l.*, for the use and occupation of a messuage, &c. of the plaintiff, by them occupied and enjoyed; laying the promise to pay, while the defendant, *Mary Ann*, was unmarried. The second count was for half a year's rent, due at *Lady Day*, 1836, of a dwelling-house and premises, demised by the plaintiff to the defendant, *Elizabeth Mary Ann*, before her marriage, and *Henry* on the 25th December, 1834, at a yearly rent of 90*l.*, payable quarterly. The defendants pleaded to the first count; first, that the defendants *Elizabeth Mary Anne* and *Henry* did not, while the said *Mary Ann* was unmarried, promise as therein mentioned; secondly, payment partly by those three defendants, while the defendant *Mary Ann* was unmarried, and partly by the defendants *Elizabeth R. W. Munn* and *Henry*, of divers sums of money, in full satisfaction and discharge of the monies in the first count mentioned, and thereby claimed for and in respect of the alleged use and occupation whilst the said *Mary Ann* was unmarried. To the second count, the defendants pleaded, first, the general issue; secondly, a denial of the demise as in that count mentioned; thirdly, an eviction by the plaintiff before the rent claimed became due, and after the marriage of the defendants, *Munn* and his wife; and fourthly, a determination of the demise by operation of law before the rent became due. The replications denied the alleged payment and eviction, and joined issue on the other pleas. At the trial, before *Parke*, B., at the last Worcester assizes, it appeared, that *Henry Bowers* and his daughters, *Elizabeth* and *Mary Ann*, entered into possession of the premises in question, under an agreement, bearing date the 25 December, 1834, whereby, the plaintiffs agreed to let, and the defendants *Henry Bowers, Elizabeth* and *Mary Ann*, agreed to take for the term of seven years, a newly erected dwelling-house, at *Great Malvern*, belonging to the plaintiff, at the yearly rent of 90*l.*, to be paid quarterly; a lease to be drawn as between landlord and tenant, and to contain the usual covenants, provisoes, and agreements. This agreement was stamped with a lease stamp, and signed by the three defendants, parties to it, but not by the defendant. The house was furnished by *Bowers*, and let to visitors who came to *Malvern* during the summer. The parties continued to occupy until Christmas, 1835, when *Henry Bowers* became bankrupt. On the 15th September, 1835, *Mary Anne Bowers* married the defendant *Munn*. It was proved, that the assignees, under *Henry Bowers's* bankruptcy, had paid the

quarter's rent due at *Michaelmas*, and that the plaintiff had admitted the receipt of the two former quarter's rent; but it did not appear when the payments had been made or by whom. It was objected, on the part of the defendant, that the agreement, not being signed by the plaintiff, could not operate as a demise. To this it was replied, that inasmuch as the parties had entered into possession and paid rent, there was evidence of an yearly tenancy upon the terms of that agreement. The learned judge was of opinion, that although the payment of rent might be evidence of an yearly tenancy, yet, there did not appear to him to be any evidence that the payments of rent were made before the marriage of Mrs. *Munn*, or that she had authorized such payments since her marriage. A verdict was found for the defendants on the second and fourth issues, with liberty to move to enter a verdict on those issues for 45*l*. On the other issues the plaintiff had a verdict.

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*Talfourd*, Serjt., now moved accordingly. The plea of payment is an admission upon the record of the demise alleged in the declaration. [*Parke*, B.—You must shew a demise independently of that issue. The agreement not being signed by the plaintiff, would not operate as a demise, and the parties who entered under it were mere tenants at will, unless they occupied for a longer period than a year, or paid an yearly rent, and there was no evidence whatever of a payment by Mrs. *Munn*, or with her authority.] In *Cox v. Bent* (a), the plaintiff had entered under an agreement for a lease, and it was held, that an admission of a charge of half a year's rent, is an account between him and his landlord, and was sufficient to constitute him an yearly tenant.

LORD ABINGER, C. B.—If there had been any evidence of payment by Mrs. *Munn*, whilst she was unmarried, it might have been a question for the jury, whether, under all the circumstances, she had not assented to a new contract. But there was no evidence of such payment, and it does not appear that she paid any rent after her marriage.

PARKE, B.—I am of opinion, that there is no evidence to constitute a new contract. Under the old contract there was no demise, but the utmost effect that could be given to it, was a tenancy at will. Then in order to constitute a new tenancy, it was necessary to shew that the three to the instrument agreed to pay it, and to become tenants from year to year. But there was no evidence to shew the assent of the married sister to the new contract, and, for ought that appeared, the rent might have been paid after her marriage and without her knowledge.

ALDERSON, B.—If it had been proved that the rent had been paid by the other parties before the marriage, and whilst she was in the occupation of the premises, it would have been a question for the jury whether that was not a payment by all: but there was no evidence of that, and no proof whatever of a payment after the marriage.

Rule refused.

(a) 5 Bing. 185.



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## BEALE v. OVERTON.

The sheriff must apply to the court under the interpleader act, within such time in the term following the claim, as to enable the parties to shew cause in that term, and if he is guilty of laches, the rule will be discharged, or he must pay the costs of both parties.

THIS was a sheriff's interpleader rule. It appeared that the sheriff had entered into possession, on the 25th *November*, and, on the 28th, he received notice, that the property belonged to a trustee, under the marriage settlement of the defendant's wife. He, however, remained in possession until the 28th *January*, when he applied to the Court.

*Willmore*, on behalf of the claimants, objected, that the application came too late. He referred to *Cook v. Allen* (a), and *Ridgway v. Fisher* (b).

*Humphrey* appeared for the execution creditor, and *Butt* for the sheriff.

PARKER, B.—The sheriff comes too late and must make his election; either the rule must be discharged, in which case, the sheriff will be liable to an action, or he must pay the costs of both the other parties. He ought to have applied within such time, in the term next after the claim, as to enable the other parties to shew cause in that term.

ALDERSON, B.—In such a case as this, the sheriff will not be safe unless he applies within the first four days of the following term.

Rule accordingly.

(a) 1 C. & M. 542; 2 Dow. P. C. 11. (b) 1 Har. & Woll. 189; 3 Dow. P. C. 567.

END OF EASTER TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

C O U R T O F E X C H E Q U E R,

IN

Trinity Term, 1837.

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ASHBY v. HARRIES, Esq.

DEBT against the sheriff of *Northamptonshire*, for extortion. The declaration alleged, that a writ of *testatum fieri facias*, was sued out against the plaintiff, at the suit of *H. B. Whitmore* and *R. Whitmore*, directed to the sheriff of *Northamptonshire*, whereby he was commanded to levy of the goods and chattels of the defendant, 54*l.* 9*s.* 2*d.*, for damages recovered by *H. B. Whitmore* and *R. Whitmore*, against the defendant; that the writ was indorsed to levy 22*l.* 17*s.* 6*d.*, besides sheriff's poundage, officers' fees, and all legal incidental expenses, and was delivered to the defendant as sheriff of *Northamptonshire*, by virtue of which said writ and indorsement, the defendant, as such sheriff, seized and took in execution divers goods and chattels of the plaintiff, of great value, to wit, of the value of the monies so indorsed on the said writ, and directed to be levied as aforesaid, and then levied the same; yet, that the defendant so being sheriff as aforesaid, by reason and under colour of his said office, and under and by colour of the said writ of *testatum fieri facias*, sued out against the plaintiff wrongfully, illegally, and oppressively received and took from the plaintiff, for the serving and executing of the said writ, more and other consideration and recompense than by the statute in such case made and provided in that behalf is allowed, that is to say, the sum of 1*l.* 16*s.* 2*d.* more than in that statute is limited and appointed, contrary to the form of the statute, &c.

Semble that, in an action against the sheriff for extortion in levying under a *fi. fa.*, the declaration must state the sum actually taken, and it is not sufficient to allege that the sheriff took a certain sum more than is allowed by the statute.

*Special demurrer*, assigning the following causes:—That although it appears by the declaration, that the writ was indorsed to levy 22*l.* 17*s.* 6*d.*, besides sheriff's poundage, officers' fees, and all legal incidental expenses, yet the plaintiff, in the allegation that the defendant seized and took in execution divers goods and chattels of the plaintiff, of great value, to wit, of the value of the monies so indorsed on the writ, and directed to be levied as aforesaid, and then levied the same, has not shewn, with sufficient certainty, whether he

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means that the defendant took in execution goods of the value of the said sum of 22*l.* 17*s.* 6*d.* only, or of that sum together with sheriff's poundage, officers' fees, and other legal incidental expenses; and also that the plaintiff has not, by his declaration, shewn with sufficient certainty, whether the defendant, by reason and under colour of his office, and under and by colour of the said writ, wrongfully received and took from the plaintiff, for the serving and executing of the said writ, more and other consideration and recompense than by the statute is allowed, in addition to and exclusive of the officers' fees and all legal incidental expenses; or whether he, the plaintiff, means to charge the sheriff with having taken and received more and greater recompense than is allowed by the statute 29 Eliz. c. 4, or the 43 Geo. 3, c. 46, s. 5, and that the plaintiff has not stated or alleged, how much the defendant received and took from the plaintiff for the serving and executing of the writ, but merely that he received and took 1*l.* 16*s.* 2*d.* more than by the statute is allowed, and the plaintiff, by such last-mentioned allegation, has so mixed up the law and fact, that the Court cannot see on the face of the declaration, whether or not the defendant has taken or received more than by law allowed; and the defendant cannot take issue on the allegation, without leaving it to the jury to determine the law, and to say, whether the defendant has taken more than by law allowed, whereas, it is the province of the jury to say, merely, how much the defendant took by way of such consideration and recompense; and the province of the Court to say, whether such sum is more than allowed by statute, and the plaintiff ought, therefore, to have stated in the declaration, how much the defendant took as such consideration and recompense.

*Joinder in demurrer.*

*Peacock*, in support of the demurrer.—The declaration mixes up the law and fact. It should have been stated how much the defendant took, or that he took more than a shilling in the pound on the sum levied. If the actual sum had been stated, that would have been traversable; but, in the present form of declaring, should any doubt arise at *nisi prius*, as to the construction of the statute, the jury would have to decide on the question of law instead of the Court. In Comyn's Digest, title, Pleader, (E 34.) it is said, "that every plea ought to be triable, and therefore must consist of matter of law which is determinable by the Court, or matter of record which is triable by the record, or matter of fact which is triable by the country; and if fact is complicated with matter of law so that it cannot be tried by the Court or jury, the plea is bad; as if the defendant pleads that A. *licite gavitus fuit bond felon*, it will be bad, for the jury cannot determine whether he lawfully enjoyed, nor the Court whether he enjoyed. So if the condition of a bond be, that he will shew a sufficient discharge of an annuity, it is bad if he pleads that he shewed a sufficient discharge, for the jury cannot try whether it is sufficient, but he ought to shew what discharge he gave, and the Court will judge whether it is sufficient." Suppose a plea of the Statute of Limitations should state, that the cause of action did not accrue within the time limited by law, that would be bad, inasmuch as the fact and law would both be submitted to the jury. Had the plea been so framed in *Paget v. Foley* (a), where the question was, whether an action for rent, due on a lease, was limited to six years by the 3 & 4 W. 4,

(a) 2 Bing. N. C. 679.

c. 27, s. 42, or to twenty years, by the 3 & 4 W. 4, c. 42, s. 3, that complicated question would have been presented to the jury. If this form of pleading be held good, it will be necessary, in every case where the law is doubtful, to incur the expense of a trial to ascertain the fact, and then to go to the Court for its decision upon this law. It appears, from the case of *Lyster v. Bromley* (b), that formerly a difficulty arose in the construction of this very statute, the 29th Eliz. c. 4, and it was doubted, whether the sheriff ought to have twelve pence in the pound on the first 100*l.*, and sixpence in the pound for all the amount beyond the first 100*l.*; or, whether he ought to have but sixpence where the sum exceeds 100*l.* If this point were now doubted, the law would, by this mode of declaring, be mixed up with the fact. [*Parke, B.*—It may be questionable whether the sheriff can levy for the expenses of his poundage.] That point came before the Court in *Burney v. Taffnell* (c), and may be intended to be raised here.

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*Humphrey* was to have argued in support of the declaration, when

*PARKER, B.* said—There is considerable weight in what has been urged, and I think you had better amend.

Amendment on payment of costs.

(b) Cro. Car. 286.

(c) 12 Bing. 255; 9 Moore, 425.

### IN re ROBERT THOMPSON.

THIS was an application to set aside a writ of privilege. It appeared that a bill had been filed, in the Court of Chancery, against Mr. *Thompson* and other persons, as executors and trustees under the will of a deceased party. Mr. *Thompson*, who was one of the side-clerks in the *King's Remembrancer's Office*, sued out a writ of privilege, and served a copy on the plaintiff (d).

A general writ of privilege does not operate as an injunction, or supersede the necessity of pleading the privilege, but is a mere notice that the party is entitled to it.

(d) William the Fourth, &c., to all whom these present letters shall come, greeting.—Whereas, as well from our royal dignity as from ancient custom, in consequence thereof, used time beyond the memory of man hitherto, it hath obtained, that the barons of our Exchequer, the clerks residing there, and all other ministers officiating thereof, whether they be of the clergy, or such others as belong to the King's Court who assist there by command, should not be required to appear out of the said Exchequer, for any causes, before any judges whatsoever, or the very judge before whom the suit should be depending, whether ecclesiastical or secular; and that if they should happen to be cited by reason of any power granted by the Crown, they should, by public authority, be excused; and that the same persons should be free and acquitted from all common juries, suits of court in the county court, hundred court, and other courts whatsoever, as well held for and in their lordships as elsewhere within their fees, and likewise for minderwite exercises,

watchings, and danegelts, and also from any provision or purveyance, or other payments by way of customs for any victuals whatsoever, for their own houses brought, in any cities, castles, or maritime places whatsoever, and from any other assarts of their own demesnes, and from the payment of any toll or custom; and that they should not be impleaded elsewhere than in the Exchequer aforesaid, so long as the said Exchequer shall be open: as appears by the inspection of the red-book of our Exchequer, under the title relating to the rights and privileges of the residents of the Exchequer which Henry the First, by writ, granted for the perpetual exemption of such as assist there. We therefore command you, and strictly enjoin, not to molest, or permit to be molested, as far as in you lies, *Robert Thompson, Esq.*, one of the clerks in the Office of His Majesty's Remembrancer, of our Exchequer, at *Westminster*, whose continual residence is there required, contrary to the tenor of the privileges aforesaid, nor compel him to execute

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*Simpkinson* and *Beavan* moved to set aside the writ.—It is doubtful whether the privilege of an officer of this Court is available against a proceeding in the Court of Chancery. In *Viner's Abridgment*, title *Privilege*, 524, n. 26, it is said, the Lord Chancellor *Egerton* declared, that no Chequer-man is privileged against a subpoena of this court; and several pleas by officers there, as register, receiver, &c., have been overruled. But, at all events, the writ only applies to cases where the officer is sued alone, and in his individual capacity. In *Fanshaw v. Fanshaw* (a), two of the defendants, being officers of the Exchequer, pled the privilege of the Exchequer; plea overruled, because there was a third defendant, who had no right of privilege. *Powle's case* (b), *Moly v. Cook* (c), *Townsend v. Duppa* (d), *Pratt v. Salt* (e), *Robarts v. Mason* (f), *Ramsbottom v. Harcourt* (g), all establish, that the principle cannot be made use of, where the party claiming it is sued jointly with other persons. If the law were not so, this inconsistency would follow—that, if the other party happened to be an officer of the Court of Chancery, there would be no means of suing at all. Further, to entitle a party to this privilege, he must be sued in his personal, and not in his representative, character. Another objection to the writ is, that the bill was filed, and the subpoena served, when the Court of Exchequer was not sitting. The form of the writ of privilege is, that the officers of the Exchequer are not to be impleaded in any other court, so long as the said Court of Exchequer shall be open.

*Charles Cooper* and *Bacon*, *contrà*.—Though the Courts may not be disposed to favour a privilege, now that the reason for establishing it has passed away; yet, if it is no longer useful, or even injurious, it is for the legislature, and not the Court, to interfere. It is true, that, in certain cases, the privilege has not been allowed, when the party claiming it has been sued jointly with others not privileged; but it will be found, that, in all those cases, the reason for disallowing the privilege was, that the party could not have the same remedy in the court the privilege was claimed. In the Court of Chancery, though there is both an equity and common law jurisdiction, yet, if the case required the decision of a jury, the party could not have the complete remedy he desired. Chief Baron *Gilbert*, in his treatise on Civil Actions in the Common Pleas (h), after stating, that the particular privilege of the officers of each court is not to be impleaded elsewhere, goes on to say, “ But this is to be understood where the plaintiff can have the same remedy against the officer in his own court, as in that where he sues him; for, if money be attached in an attorney's hands, by foreign attachment, in the sheriff's court in *London*, he shall not have his privilege; because, in this case, the plaintiff would be remediless, for the foreign attachment is by particular custom of *London*, and does not lie at com-

any office, but cause him to have firm quiet in that respect, under the penalty that shall befall thereon: and if, on these occasions, or any of them, ye shall have taken any distress or provision from the said *Robert Thompson*, or his servants, that ye cause the same to be restored to him without delay; or if ye have arrested the said *Robert Thompson*, that ye forthwith suffer him to go at large, upon the pain that shall befall thereon. For witness whereof, we have caused these our letters to be made patent.

Witness, *James*, Lord *Abinger*, at *Westminster*, the 31st day of *January*, in the 7th year of our reign, by the tenor of the red-book, and by the barons. VINCENT.

(a) 1 *Vernon*, 246.

(b) *Dyer*, 377.

(c) *Vent*, 298.

(d) *Str.* 610.

(e) Cited *Bac. Ab. tit. Priv.* 533.

(f) 1 *Taunt.* 245.

(g) 4 *M. & S.* 585.

(h) *P.* 209.

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mon law; so that, if an attorney should have his privilege, the plaintiff should be without his redress. So if a writ of entry, or other real action, be brought against an attorney of the King's Bench, he cannot plead his privilege; because, if this should be allowed, the plaintiff would have a right, without remedy; for the King's Bench hath not cognizance of real actions. So if an attorney of the Common Pleas be sued in an appeal, he shall not have his privilege; for his own court hath not cognizance of this action, and, by this protection, he should go unpunished." In the Court of Exchequer, no case could arise, in which the party against whom the privilege is set up, would not have an equal remedy as in any other court, either of law or equity. Numerous instances are collected in *Burton's Practice in the Exchequer Office of Pleas* (h), where the privilege has been allowed, though the party claiming it has been joined with others. In the 11 Prac. 2, *Newport*, (servant of *W. Ford*, one of the barons,) and *Margaret*, his wife, against *Horseman*, in debt, *pro debo prefat. Margarette dum sola fuit*; Mich. 7 Hen. 5, *Dixon*, clerk of the pipe, and two others not having privilege, against *Walter*, the parson of St. *Margaret-Moises*, in *London*, in trespass. But the plaintiff is premature in making this application. The writ is not addressed to the plaintiff, but to the lord chancellor; and without Mr. *Thompson* should take the further proceeding of pleading the privilege, the writ is a mere nullity. Supposing Mr. *Thompson* had been arrested, the sheriff would not be justified in discharging him, upon the mere production of this writ. *Crossly v. Shaw* (k). Until the privilege is pleaded, the question as to how far he is entitled to avail himself of it cannot arise. *Snee v. Humfreys* (z). The only effect of the suing out the writ is, to give notice that he is an officer of the Court of Exchequer, and enjoying the privilege. There is a distinction between the writ of privilege and an injunction of privilege.

*Simpkinson* in reply, contended that the writ operated as an injunction of privilege.

LORD ABINGER, C. B.—I am of opinion that there is no ground for the application. This writ is not an injunction, but is nothing more than a testification under the authority of the court, that the party has a general privilege, and it is a mistake to suppose this document can be used for the purpose of intimidation in the present case. The suing out of the writ of privilege does not do away with the necessity of pleading the privilege, but it is only evidence in support of the plea. We are asked to set aside the writ because the privilege cannot apply to this particular case; but why set it aside?—because the party tries to make that use of it which the law does not permit. As the attempt has been made to use the writ for the purpose of deceiving the plaintiff, the application will be discharged without costs.

Application discharged.

(h) Vol. 1, p. 45, 48.

(k) 2 W. Black. 1084.

(z) 1 Wils. 366.

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## HEDGER v. STEVENSON.

The following was held a sufficient notice of dishonour of a promissory note: "Sir, I am desired by Mr. H. to give you notice, that a promissory note, dated August 10, 1835, made by S. T. for 99l. 18s., payable to your order two months after date thereof, became due yesterday, and has been returned unpaid; I have to request you will please remit the amount thereof, with 1s. 6d., noting, free of postage, by return of post."

The declaration alleged, that one S. T. made his promissory note, and promised to pay to the order of the defendant at Messrs. B., T., & B.'s 99l. 18s., and then delivered the note to the defendant, and promised to pay the same according to the tenor and effect thereof. But the said Messrs. B., T., & B. did not, nor did the said S. T., nor the defendant, or any other person, pay the said note, although the said note was presented at Messrs. B., T., & B.'s on the day when it became due, of which the defendant had notice. Held, that the promise and breach were sufficient after verdict.

**A**SSUMPSIT by indorsee against payee of a promissory note. The declaration stated, that one *Samuel Thompson*, on the 10th day of *August*, in the year 1835, made his promissory note in writing, and thereby promised to pay to the order of defendant, at Messrs. *Barclay, Tritton, and Barclay's, London*, 99l. 18s., two months after the date thereof, for value received, which period had, at the time of the commencement of this suit, elapsed; and then delivered the said note to the defendant; and the defendant indorsed the said note to the plaintiff, and then promised to pay the same according to the tenor and effect thereof. But the said Messrs. *Barclay, Tritton, and Barclay*, did not, nor did the said *Samuel Thompson*, nor the defendant, or any other person pay the said note, although the said note was presented at Messrs. *Barclay, Tritton, and Barclay's* aforesaid, on the day when it became due, of which the defendant then had notice. *Plea*—That the defendant had not due notice of the non-payment of the said note *modo et forma*. At the trial, before *Parke, B.*, at the *London* sittings in term, the following letter from the plaintiff's attorney was put in as notice of dishonour:—

"*London, 30, Broad Street Buildings, 14th October, 1835.*

"Sir,—I am desired by Mr. *Hedger*, to give you notice that a promissory note, dated *August* the 10th, 1835, made by *Samuel Thompson* for 99l. 18s., payable to your order two months after date thereof, became due yesterday and has been returned unpaid. I have to request you will please to remit the amount thereof, with 1s. 6d., noting, free of postage, by return of post.

"I am, &c., *JONES SHYER*."

It was objected, on the part of the defendant, that this letter was a mere statement of the note being unpaid, and did not amount to a notice of dishonour. A verdict having been found for the plaintiff, with liberty for the defendant to move to enter a verdict, if the Court should be of opinion that the notice of dishonour was insufficient,

*W. H. Watson* moved accordingly, citing *Bolton v. Welch (a)*, *Hartley v. Case (b)*, and *Solarte v. Palmer (c)*, and also in arrest of judgment, on two grounds; first, that the promise was not in accordance with the obligation, inasmuch as the legal obligation was to pay upon request after due notice of dishonour, whereas the promise was laid to pay according to the tenor and effect of the note; secondly, that the breach was improper, as it merely alleged a non-payment on the day when the note became due, but did not aver a non-payment afterwards,

A rule having been granted on both points,

(a) 2 *Hodges*, 77; 3 *Bingh. N. C.* 688.

(c) 1 *C. & J.* 417.

(b) 4 *B. & C.* 339; 6 *D. & R.* 505.

*Humfrey and Hoggins* shewed cause.—The present case is distinguishable from *Bolton v. Welch* (*d*); there the letter only stated that the note had become due, and had been returned unpaid; but here, there is a charge for noting, which sufficiently intimates that the bill has been dishonoured. In *Grugeon v. Smith* (*e*), tried before *Patteson, J.*, at *Liverpool*, the notice was,—“Your bill, due this day, has been returned with charges, to which we request your immediate attention;” and on motion for a new trial, the Court of King’s Bench thought the notice sufficient, and refused a rule. In *Hartley v. Case* (*f*), the letter only amounted to a notice, that an action would be commenced; the form there used was, “I am desired to apply to you for the payment of the sum of 150*l.* due to myself, upon a draft drawn by Mr. Case on Mr. Case, and which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place.” Lord *Tenterden* thought that notice insufficient, and on motion to set aside the nonsuit, he says,—“There is no precise form of words necessary in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor.” In *Solarte v. Palmer* (*g*), the notice, which was from the plaintiff’s attorney, only informed the defendants, that a bill bearing their indorsement had been put into his hands, “with directions to take legal measures for the recovery thereof, unless immediately paid.” [*Gurney, B.*—It stated neither acceptance, presentment, or dishonour.] It cannot be said that those cases resemble *Bolton v. Welch*, where the notice was, “The promissory note for 200*l.* drawn by *H. Hanley*, dated the 18th *July* last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give notice thereof, and request you will pay the amount thereof forthwith.” The words “returned unpaid” are, in ordinary language, equivalent to saying that payment had been demanded and refused. The form of protest given by the 9th & 10th W. 3, c. 17, is seldom or ever used. In *Solarte v. Palmer*, *Tindal, C. J.*, in delivering judgment, says (*h*),—“The notice of dishonour, which is commonly substituted in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover, most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted, but it should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment.”

Then as to the motion in arrest of judgment. First, the promise is sufficient; the declaration alleges the indorsement of the note, and that the defendant promised to pay “according to the tenor and effect thereof,” that is, in case he had due notice of the dishonour; secondly, the breach is sufficient; it avers a non-payment by each of the parties, at the time that particular party ought to have paid. But, at all events, this objection is cured by verdict. 1 Will.’s Saund. 227, 8.

*W. H. Watson*, in support of the rule.—The authorities establish that there must be a notice of dishonour, which means a presentment to the acceptor,

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(*d*) 2 Hodges, 77; Bing. N. C.  
(*e*) E. T. not yet reported.

(*f*) 4 B. & C.; 6 D. & R. 505.  
(*g*) 1 C. & J. 417.  
(*h*) 1 C. & J. 421.



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and non-payment by him ; and it is not sufficient merely to say that the bill is unpaid. The issue is not raised upon the mere fact of the bill being unpaid, but that the bill was not paid in manner and form as alleged in the declaration. In foreign bills, a formal protest is made use of, and a protest which merely stated the bill to be unpaid, would be insufficient. The 9th & 10th W. 3, c. 17, gives the form of protest ; and the notice of dishonour, which is substituted for it, should be equally clear and explicit. In *Hartley v. Case*, it would be obvious to any person receiving the notice, that the bill had been returned unpaid, and that the holder had a legal remedy upon it ; but yet the notice was held insufficient, as it did not convey an intimation that payment of the bill had been refused by the acceptor. It is consistent with the present notice, that the bill has been returned unpaid, although not presented, or presented after the day when it became due. The case of *Grugeon v. Smith* is directly at variance with *Solarte v. Palmer*.

Secondly, the judgment ought to be arrested. The promise laid in the declaration is not the obligation which the law casts upon the indorser ; and though the law might imply a promise if none were laid, yet, if a promise be alleged more extensive than the obligation, it is bad, even after verdict. Here the promise is to pay "according to the tenor thereof," but the obligation of the indorser is only to pay after presentment, dishonour, and due notice of dishonour, and then he becomes liable to pay upon request. But further the breach is insufficient. It alleges that he did not pay the bill on the day when it became due which he was not bound in law to do ; and it is perfectly consistent with that allegation that he may have paid it afterwards.

PARKE, B.—The rule for entering a nonsuit must be discharged, and also the rule for arresting the judgment. The first question, which is one of considerable importance, is, whether there is a sufficient notice of dishonour. The law upon this point is established by the decision in *Solarte v. Palmer*, which confirmed that of *Hartley v. Case*, against the previous opinion of the profession. It is certain that, after the case of *Tindal v. Brown*, there had been an impression, that it was sufficient if the notice conveyed an intimation that the party to whom it was given was looked to for payment of the bill or note. *Hartley v. Case* first made an alteration in the law, and decided that the view so taken was not correct. Lord *Tenterden* laid it down, that though no precise form of words is necessary to be used in giving notice of dishonour, yet, that the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Upon the authority of that case, the Court of Exchequer Chamber and the House of Lords decided *Solarte v. Palmer*, and held the notice there used insufficient. By that decision we are bound, though I am not prepared to say that I am bound by all the reasoning or language of the learned judges in giving their opinion ; and, therefore, should myself doubt, whether we should go so far as to say, that it ought to appear upon the face of the instrument, by express terms or necessary implication, that the bill was presented and dishonoured ; it seems to me enough, if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him. But supposing that we are bound by the precise expression of *Tindal, C. J.*, in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the term "necessary

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implication;" for were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor. We must not put such a meaning on it as would exclude the possibility of any other inference than that the bill had been so presented, and returned unpaid. The extent to which necessary implication should be carried, is stated by Lord *Eldon*, who says, "Necessary implication means, not natural necessity, but so strong a probability, that an intention, contrary to that which is imputed, cannot be supported. *Wilkinson v. Adams* (a). If we adopt such a rule in the present case, could it be doubted by any mercantile man that the bill had been presented to the acceptor when due, and was not honoured? Look at the language of the notice:—"I am desired to give you notice, that a promissory note, (describing it,) payable to your order, became due yesterday, and has been returned unpaid. I have to request you will remit the amount thereof, with 1s. 6d. noting." Can any one doubt the use of the term, "returned unpaid?" The word "returned" is almost a technical term in matters of this nature, and means, that the bill has come to maturity, and has not been paid. Upon reading this notice, I should say, it appears, by necessary implication, (in the meaning I attach to the term,) that the note has been duly presented, and dishonoured. This is the opinion I should have formed, previously to the case of *Bolton v. Welch*; and we are not called upon to overrule that case without some authority to the contrary. The notice in *Grugeon v. Smith* is in the same terms as the present; and as we must determine to which of the two cases we will subscribe, I must say, I think that the one in the Common Pleas is not rightly determined. There is, indeed, one circumstance mentioned in this notice of dishonour, which does not appear in the notice in *Bolton v. Welch*, viz., that the bill had been noted. That constitutes a distinction between the two cases; but I disclaim to go on that distinction. In *Solarte v. Palmer*, it was contended, that there was no intimation that the bill had been presented for payment, or that it was unpaid, or even that it was due; and the argument for the sufficiency of the notice rested on its containing sufficient information that the party was held liable to the holder. In the present case, no mercantile man, upon reading the notice, could possibly misunderstand its meaning.

It was also contended, that the judgment should be arrested, on two grounds. First, that the promise laid in the declaration is not the correct legal promise. I before thought, and still think, that this is not an incorrect mode of laying the promise, especially after verdict; it is the promise which results from the fact of the indorsement. The declaration states the note to have been drawn by *Thompson*, payable to the order of the defendant, and delivered to him, and by him indorsed to the plaintiff; and that the defendant promised to pay, according to the tenor and effect of the note and of the indorsement. That is not an improper description of the liability of the indorser; it means, that he will pay the note, when due, after presentment and notice of dishonour. The second ground in arrest of judgment was, that that there was no sufficient breach. I am of opinion, that the breach may be so read as to constitute a good breach, viz., a non-payment by the indorser, after presentment of the note, and after non-payment by the maker, and due notice that it was unpaid. The allegation is, that Messrs. *Barclay and Co.*

(a) 1 Ves. & Bea. 466.

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did not, nor did the said *Thompson*, nor the defendant, or any other person, pay the note, although the said note was presented at Messrs. *Barclay* and Co.'s on the day when it became due. It does not say, that the defendant did not pay when the note was presented, but at any time; and imports no more than this, that, although presented, neither of the parties paid it at any time. That is a sufficient breach after verdict. As to whether it might or might not have been bad, on special demurrer, we are not called upon to give an opinion.

BOLLAND, B.—I am of the same opinion upon both points. We ought not strictly to construe an instrument of this nature; provided it contain a notice that the bill has been dishonoured, and that the party by whom it was given is considered liable, that is sufficient. Let us look at the circumstances by which matters of this nature are accompanied. Long acquainted as I have been with mercantile affairs, not only professionally, but practically, I, for one, do not feel inclined to fetter these transactions with difficulties; nor will I do so, unless I am compelled by the authority of decided cases. Let us look at this case, and see whether any man, who had been only a week conversant with business, could have doubted that this instrument had been dishonoured, and that he was held liable to pay the amount due upon it. In the first place, it is a returned note, an expression which is perfectly understood in the city of *London*. Then, looking at the notice, it describes the note, the amount is given, and it is stated to be due the day before, and goes on to request that the defendant would remit the amount, and adds, further, that he claims 1*s.* 6*d.* for noting, which, though he was not entitled to request, it was, nevertheless, some further information with respect to the note. Considering the terms of the notice, I think, that even the most unpractised man would be perfectly satisfied with what had happened to the bill.

ALDERSON, B.—The only conclusion to be drawn from the cases of *Hartley v. Case* and *Solarte v. Palmer* is, that a notice of dishonour must not merely convey information that the party is held liable, but also that the note or bill has been dishonoured. I likewise disclaim being bound by the express words of the judges, if the term "necessary implication" is used by them in a strict sense. It must have that reasonable construction which is given in the judgment of Lord *Eldon*, cited by my brother *Parke*. In that view of the case, the requisites are fully satisfied by the terms of this notice; the presentment and dishonour are to be inferred necessarily from the words here used.

GURNEY, B.—I do not think *Bolton v. Welch* is governed by the cases of *Hartley v. Case* and *Solarte v. Palmer*; and we are fortified in our opinion, that this notice is sufficient by *Grugeon v. Smith*, in which the terms of the notice were not so strong as in the present case.

PARKE, B., stated, that he might add, that Lord *Abinger* had no doubt of the notice being sufficient.

Rule discharged.

## WHEATLEY v. PATRICK.

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**CASE.** The declaration stated, that before and at the time of the committing of the grievance, &c., the plaintiff was possessed of a certain horse of great value, to wit, &c., which said horse, together with another horse, was then drawing a certain coach of the plaintiff, in and along a certain common and public highway, &c.; and that the defendant was then possessed of a chaise and horse drawing the same, which were then under the care, management, government, and direction of the defendant, who was then driving the same: nevertheless, the defendant so carelessly, negligently, and improperly, drove and directed the said chaise and horse, that, through the carelessness, negligence, and improper conduct of the defendant, the defendant's said chaise ran and struck against the defendant's said horse, and killed it.

*Plea*—Not guilty.

At the trial, before Lord *Abinger*, C. B., at the *Middlesex* sittings after *Easter* Term, it appeared that the defendant, who was a clerk in the house of Messrs. *De Lafosse* and Co., had borrowed of them a horse and gig, and went upon an excursion into the country, accompanied by a Mr. *Nicholls*, and on their return home the accident occurred, and at that time *Nicholls* was driving. It was objected, on the part of the defendant, that these facts did not support the allegation that the defendant was possessed of the horse and chaise, and that he was driving the same. The learned judge was of opinion that the allegation was sufficiently proved; and a verdict was found for the plaintiff, with liberty to move to enter a nonsuit, if the Court should be of opinion that the proof was insufficient.

The defendant borrowed of D. a horse and chaise, and permitted C. to drive. By C.'s misconduct, injury was done to the plaintiff's horse:—*Held*, that the declaration properly charged the defendant with being possessed of, and driving, the horse and chaise, and that the injury was occasioned by his negligent driving.

Sir *W. Follett* now moved accordingly.—The action cannot be maintained against the defendant. The ground upon which a party is held responsible for the wrongful acts of another, is, that he has a remedy against that other to indemnify himself: that would not apply here. A master is liable for the wrongful acts of his servant, but then he would have an action over against him. So in the case of a stage-coachman suffering another person to drive, the proprietor would have his remedy against the coachman. But here there was no implied undertaking by the defendant with *De Lafosse* and Co., that he should himself drive, so that they could not maintain an action against him for suffering *Nicholls* to drive. Case will lie against a party by whose negligence an injury, not wilful, is occasioned, though the injury be immediate. *Williams v. Holland* (a). The defendant is not charged as having driven by his servant, as in *Laugher v. Forister* (b).

LORD ABINGER, C. B.—I am of opinion that there is no ground for the objection. The declaration charges that the defendant was possessed of a chaise and horse, which were under his direction. Now, as the defendant borrowed the horse and chaise, and was using them for his own enjoyment, he may be considered as the person possessed of them. The question then is, whether

(a) 10 Bing. 112; 3 M. & Scott, 540.

(b) 5 B. & C. 547.

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a person in possession of a carriage, and sitting on the box and permitting another to drive, may not in the declaration be charged with having the conduct, control, and management of the carriage? I think he may; as, against all the world but *De Lafosse* and Co., he was the person possessed of the chaise. I think an action might have lain against him, alleging that *Nicholls* improperly drove with his consent; but, however that may be, there is no ground for the present motion.

BOLLAND, B.—I am of the same opinion. The only question is, whether the defendant had not the control of the chaise. *De Lafosse* and Co. lent it to him; and he, having suffered *Nicholls* to drive, must be taken to have had the management of the chaise, and to be liable for any accident that occurred.

ALDERSON, B.—The only plea is, not guilty: it is, therefore, admitted upon the record that the defendant was possessed of a horse and chaise, then being under his control. Then the only question is, whether, those facts being admitted, there was a negligent driving by the defendant. I think that is made out by proof of his having allowed *Nicholls* to drive, and that the injury was occasioned by his misconduct.

Rule refused.

### BARRY v. GOODMAN.

The plaintiff's landlord conveyed the premises to defendant, on which occasion the plaintiff gave him the following memorandum:—"I hereby certify that I remain in the house No. 3, Swinton Street, belonging to W. G., upon sufferance only, and agree to give W. G. possession at any time he may require."—*Held*, not to amount to an agreement for a new tenancy, so as to require a stamp.

TRESPASS for breaking and entering plaintiff's house, and turning out plaintiff and his family, and removing his goods.

*Plea—Liberum tenementum.*

At the trial, before Lord Abinger, C. B., at the *Middlesex* sittings after *Easter* Term, it appeared that the party under whom the plaintiff occupied the premises in question, conveyed them to the defendant; and on that occasion the plaintiff gave him the following memorandum:—

"I, *David Barry*, hereby certify that I remain in the house, No. 3, *Swinton Street*, belonging to Mr. *William Goodman*, upon sufferance only, and agree to give immediate possession to the said *William Goodman* at any time he may require.—6th *July*, 1836."

It was objected, on the part of the plaintiff, that this document did not amount merely to an attornment, but was an agreement for a new tenancy, and therefore required a stamp. The learned judge overruled the objection, and the defendant had a verdict.

*Kelly* now moved for a new trial.—The memorandum creates a new tenancy, though on sufferance only. "Attornment is the act of putting one person in the place of another as landlord. The tenant who has attorned continues to hold upon the same terms as he held of his former landlord. But here the agreement is for a new tenancy, and is for a time and upon conditions which may vary from those in the former lease, according to the agreement of the parties." Per *Holroyd, J.*, in *Cornish v. Scarell (a)*. The defen-

(a) 8 B. & C. 471; 1 M. & R. 703.

dant does not agree to hold upon the same terms as formerly, but only as tenant on sufferance. [*Alderson, B.*—The memorandum gives no interest in the land; it is a mere certificate that the former tenancy has expired.] A tenant on sufferance has an interest until possession is demanded, except by this paper no privity was shewn between the plaintiff and the defendant.

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*Lord ABINGER, C. B.*—The memorandum is a mere admission that the house was the house of *Goodman*, and that the plaintiff had no interest whatever in it. As to the agreement to give it up, that followed as a matter of course, and did not require any stipulation.

Rule refused.

Sir JOHN SMITH, Knight, *v.* THOMAS STARLING DAY and  
HENRY FRAMLINGHAM DAY, Executors of Sir HAYLETT  
FRAMLINGHAM, deceased.

**D**EBT on a bond of indemnity, dated the 24th of *May*, 1819, given by the testator to the plaintiff, subject to a certain condition, whereby, after reciting an indenture of lease of the 28th of *February*, 1786, between Sir *Thomas Spence Wilson*, since deceased, and Dame *Jane* his wife, of the one part, and *Samuel Noble*, of the other part, of certain premises for forty years, from *Christmas*, 1785; and further reciting another indenture of lease of the 10th of *December*, 1809, between the said Dame *Jane* and Sir *T. Maryon Wilson*, her son, of the one part, and *Martha Noble*, of the other part, of certain other premises, from *September*, 1808, for sixty-one years; and further reciting a sub-lease of the 20th of *May*, 1816, by the *Nobles* to Sir *H. Framlingham*, with the consent of Dame *Jane Wilson*, of parts of the premises respectively demised to them by the leases of 1786 and 1809; and further reciting another indenture of lease of the 30th of *August*, 1816, and made between the said Dame *Jane Wilson* and the said Sir *T. M. Wilson*, of the one part, and the said Sir *H. Framlingham*, of the other part, by which indenture, for the considerations therein mentioned, they the said Dame *Jane Wilson* and Sir *T. M. Wilson*, demised and leased unto Sir *H. Framlingham*, his executors, administrators, and assigns, the same portion of the premises as is comprised in the sub-lease of the 20th of *May*, 1816, and which is part of the same land as is comprised in the leases respectively of the 28th of *February*, 1786, and the 10th of *December*, 1809, to hold the pieces of land demised by the lease of the 28th of *February*, 1786, from the 25th day of *December*, 1825, where the term of forty years thereby created, would determine for the full term of forty-three years and three quarters then next following, and to hold the lands comprised in the lease of the 10th of *December*, 1809, from the 29th day of *September*, 1869, when the said term of sixty-one years, thereby created, would expire, for and during the full term of seventeen years thence next ensuing, subject during the said term of forty-three years and three quarters to a yearly rent of 3*l.*, payable to the said Dame *Jane*

An executor, after paying the debts of the testator, of which he had notice, invested certain parts of the residue in the funds, and on mortgage security, in his own name, for the benefit of the legatees, and paid them the dividends:—*Held*, that the executor could not be considered as having apportioned the residue in payment of any legacies, so as to bar the claim of a specialty creditor, although he had no notice of such claim till fifteen years after the testator's death.

*A.* being seized in fee, granted a lease to *B.* for sixty-one years, and afterwards granted a lease to *C.*, to take effect at the expiration of the first lease:—*Held*, that *A.*

had not parted with the reversion so as to prevent him from distraining for rent due from *B.*

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*Wilson* and her assigns during her life, and after her decease to the said Sir *T. M. Wilson*, during the residue of the said term, and also subject during the said term of seventeen years to the yearly rent of 52*l.*, payable to the said Sir *T. M. Wilson*, his heirs and assigns, and to the performance of the covenant therein contained for payment of the yearly rent of 6*l.*, as the consideration for the grant of the remaining terms thereby granted, and all other covenants and agreements therein reserved and contained; and further reciting, that by indenture of assignment, bearing even date with the said bond of indemnity, and made between the said Sir *H. Framlingham*, of the first part, and the said plaintiff, of the second part, the said messuages, tenements, erections, buildings, and other premises, comprised in and demised by the said indentures of lease of the 20th of *May*, 1816, and the 30th day of *August*, 1816, were assigned to and were then vested in the said plaintiff, for all the residue of the said term of years granted by the said indenture of lease, subject to the rents, covenants, and agreements, on the tenants, leasees, or assignees, part to be paid, observed, and performed, for or in respect of the same premises; and reciting, that upon treaty for the sale of the said leasehold premises to the said plaintiffs, it was and is among other things agreed, that the said Sir *H. Framlingham* should enter into a certain written obligation, to be conditioned as hereinafter is expressed; the condition of the said written obligation is declared to be such, that if the said Sir *H. Framlingham*, his executors, administrators, and assigns should, from time to time and at all times thereafter, well and sufficiently save, defend, protect, and keep harmless and indemnified the said plaintiff, his executors, administrators, and assigns, and his and their estate and effects whatsoever and wheresoever, and particularly the said hereditaments so assigned as aforesaid, or intended so to be by the said indenture of assignment of even date therewith, with their appurtenances, from and against the payment of the rents respectively reserved in and by the said indentures of lease of the 28th of *February*, 1786, and the 10th of *December*, 1809, and all actions, suits, costs, charges, damages, losses, and expenses whatsoever, which he or they might sustain or incur for, or by reason, or on account of the same rents, or either of them, or any non-payment of the same, or any part or parts thereof respectively, or otherwise in relation thereto, then the said written obligation should be void, otherwise should be and remain in full force and virtue, as by the said writing obligatory fully appears. The declaration then shewed that the estate and interest of the grantors of and in all the above demised premises, descended and came to Sir *Thomas Maryon Wilson*, who was seised thereof in fee, and the obligors of the bond, having allowed rent in respect of the premises demised by the indenture of the 10th day of *December*, 1809, to fall into arrear, Sir *Thomas Maryon Wilson* entered and distrained for the same, and the plaintiff was obliged to pay it; and that thereby an action accrued to him against the defendants upon the said bond.

*Pleas*—first, that the defendants had fully administered before the commencement of the suit; secondly, that after making the said bond, Sir *H. Framlingham* died, in the year 1820, and that the defendants had no notice of the bond till *August*, 1835, that they had fully administered before notice, and had no goods or chattels to administer since notice.

The replication traversed these pleas, upon which issues were joined.

The cause was tried before Lord *Abinger*, C. B., at the *Middlesex* sittings

after *Michaelmas* Term, 1836, when a verdict was entered for the plaintiff for 625*l.* 5*s.* damages, assessed on the breach assigned, subject to the opinion of this Court upon the following case, with liberty for either party to turn the same into a special verdict.

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The declaration was proved in point of fact. The defendants contend that it is insufficient in point of law. If the Court should be of that opinion, the judgment is to be arrested, and the subsequent question does not arise; but if the Court should be of opinion that the declaration is sufficient, the defendants rely upon the following facts as supporting one or other of their pleas:—

Sir *Haylett Framlingham*, in the pleadings mentioned, died on the 10th day of *May*, 1820. He left a will properly executed, and attested by two witnesses, dated the 2nd day of *June*, 1815, which was proved in the *Prerogative Court of Canterbury*, on the 17th of *July*, 1820, by the defendants, *Thomas Starling Day* and *Henry Framlingham Day*, executors thereof, of which the following is a copy:—

“This is the last will and testament of me, Sir *Haylett Framlingham*, Knight Commander of the Honourable Order of the Bath, and Colonel of the Royal Horse Artillery, made, published, and declared this 2nd day of *June*, in the year of our Lord 1815.—First, I nominate and appoint my nephews, *Thomas Starling Day*, and *Henry F. Day*, executors of this my will; and I do hereby authorize and direct my executors, as soon as conveniently may be after my decease, to convert all the personal estate and effects of which I shall die possessed into ready money; and after payment thereof of my just debts and funeral and testamentary charges, to lay out and invest the residue thereof in their names, in the public stocks or funds of this kingdom; and the dividends or interest thereof I give and bequeath unto my sisters, *Frances* and *Ann Framlingham*, to be paid to them in equal moieties during their joint lives; and after the decease of either of my said sisters, I give the whole of such dividends or interest unto the survivor, for and during her life; and after the decease of such survivor, then I give and bequeath the principal money which shall be so laid out and invested in the said stocks or funds, unto all or any one or more of the children or grandchildren of my sister, *Margaret Day*, in such parts, shares, and proportions, upon such trusts, and to be payable at such times as she, the said *Margaret Day*, shall, by her last will and testament, in writing, or any writing purporting to be, or being, in the nature of her last will and testament, or any codicil or codicils relating thereto, to be signed and published by her in the presence of two or more credible witnesses, direct, limit, or appoint; but if it shall happen, that my said sister, *Margaret Day*, shall not make any such direction, limitation, or appointment, then I give and bequeath the said principal sum of money unto all the children of my said sister, *Margaret Day*, who shall be living at her decease, and the issue of such of her children as shall then happen to be dead, equally to be divided amongst them, share and share alike; but it is my will, that the issue of any deceased child or children shall be only entitled to the share or shares which the parent or parents of such issue would have received, if he, she, or they had been living at the time of the decease of my said sister, *Margaret Day*; and, lastly, I give and bequeath unto my nephew, *James Day*, a lieutenant in the Royal Artillery, all the badges or marks of merit or distinction which I now possess, or may hereafter be honoured with. In witness,” &c.



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The testator died possessed of personal property to the amount of 1676*l.* 2*s.* 2*d.*, and the said *T. S. Day* and *Henry F. Day* received assets to that amount, including the produce of 997*l.* 10*s.*, New 4 per cent. Annuities, formerly 950*l.*, Navy 5 per cents., hereafter mentioned. They paid the debts and funeral and testamentary expenses of the testator, *Sir H. Framlingham*, to the amount of 525*l.* 4*s.* 5*d.*

On the 30th of *November*, 1820, the said *T. S. Day* and *H. F. Day* laid out the sum of 158*l.* 15*s.* in the purchase of 150*l.*, Navy 5 per cents., in their names, in pursuance of the will of *Sir H. Framlingham*, for the benefit of *Frances* and *Ann Framlingham*, the legatees for life.

On the 17th of *October*, 1821, the said *T. S. Day* and *H. F. Day* passed the accounts of the estate and effects of the testator, *Sir H. Framlingham*, at the *Legacy Office*, *Somerset House*, and paid the sum of 291*l.* 8*s.* 11*d.* for the legacy-duty thereon, at the rate of 3*l.* per cent., payable by the legatees under the will.

In the month of *March*, 1824, the said *T. S. Day* and *H. F. Day*, with the privity and consent of the parties interested, sold out the sum of 997*l.* 10*s.*, New 4 per cent. Annuities, formerly 950*l.*, Navy 5 per cent. Annuities, then standing in the name of *Sir Haylett Framlingham*, which produced the sum of 1061*l.* 5*s.* 2*d.*

The said *T. S. Day* and *H. F. Day*, in *March*, 1824, lent, on mortgage, in their names, at 5 per cent., to *Mr. William Pearson*, of *Sprole, Norfolk*, the sum of 1000*l.*, part of the produce arising from the sale of the 997*l.* 10*s.*, New 4 per cents.

On the 10th of *June*, 1826, the said *T. S. Day* and *H. F. Day* received back the sum of 1000*l.* of the said *Mr. William Pearson*, in discharge of his said mortgage.

On the 22nd of *August*, 1826, the said *T. S. Day* and *H. F. Day* laid out the sum of 1028*l.* 7*s.* 9*d.*, including the said sum of 1000*l.*, with the consent, in writing, of *Frances Framlingham*, *Ann Framlingham*, and *Margaret Day*, the legatees for life, and themselves, the said *T. S. Day* and *H. F. Day*, *James Day*, *E. Day*, *William Day*, *William Foster*, *Lucas Worship*, and *S. Day*, the legatees entitled to the reversion under the said will of the said *Sir H. Framlingham*, in the purchase of 53*l.*, Bank Long Annuities, in the names of the said *T. S. Day* and *H. F. Day*, under the trusts of the will, for the benefit of the said *Frances* and *Ann Framlingham*, the legatees for life, who are now respectively living. The value of the said Long Annuities exceeds the damages assessed as aforesaid.

The said *T. S. Day* and *H. F. Day*, from the year 1821 to the commencement of this action, received all the dividends and interest, from time to time, as they became due and payable, on the said sum of 954*l.*, Navy 5 per cents., afterwards 997*l.* 10*s.*, New 4 per cents., until the sale thereof aforesaid; and also on the said sum of 1000*l.* lent on mortgage to the said *William Pearson*, as aforesaid, until the same was paid off; and afterwards on the said sum of 53*l.*, Bank Long Annuities; and also on the said sum of 150*l.*, Navy 5 per cent. Annuities, afterwards 157*l.* 10*s.*, New 4 per cent. Annuities, and now 157*l.* 10*s.*, 3½ per cent. Annuities; and paid the same respectively, from time to time, to *Frances* and *Ann Framlingham*, the legatees for life under the will of the said *Sir H. Framlingham*, for their own use and benefit.

There are now standing, in the *Bank of England*, in the names of the said *T. S. Day* and *H. F. Day*, the said sum of 53*l.*, — per cent. Long Annuities, and 157*l.* 10*s.*, 3½ per cent. Annuities.

The defendants first had notice of the bond mentioned in the declaration on the first day of *August*, 1835.

The question for the opinion of the Court is, whether the preceding facts establish either of the defendant's pleas? If they do, the verdict for the plaintiff is to be set aside, and a verdict entered for the defendant upon both or either of the issues arising out of these pleas, as the Court may direct; if they do not, the verdict is to stand for the said sum of 625*l.* 5*s.*, or so much thereof as the Court shall direct.

*Kelly*, for the plaintiff.—Two questions arise; first, whether the facts stated are a defence under either of the pleas; secondly, whether the declaration is sufficient in point of law. It will be contended, on the other side, that the defendants are in the situation of having paid and satisfied the legacies; and, therefore, such payment is an answer in law to any action for a subsequent breach of the bond. But the investment of the stock in their names, although for the benefit of the legatees, cannot be considered as a payment. Assuming, however, that there is a payment in contemplation of law, still that would afford no answer to the action. *The Governor and Company of the Chelsea Water-Works v. Cowper* (a), is the only case which at all authorizes the position, that the payment of debts and legacies, without notice of any other subsisting demand, is a good answer to a subsequent action. That case, however, does not appear to have been considered in full court, or to have been acted upon as a valid authority; but, on the contrary, has been much doubted, both in courts of law and equity. There, too, twenty-two years had elapsed since the executor had paid over the legacies, and before he received notice of any outstanding claim. The payment of simple contract debts, without notice, may be an answer to claims of a higher nature; but the payment of legacies has never been so considered, as the executor can compel the legatees to refund. *Hawkins v. Day* (b). An executor, before he parts with the residue, may apply to a court of equity for an indemnity against a contingent demand. *Simmons v. Bolland* (c). [*Alderson*, B.—There the executor had notice of the covenant, though not of the breach.] In *Davis v. Blackwell* (d), *Tindal*, C. J., says, "I am not prepared to say, that the payment of legacies would, in any case, afford an answer, in a court of law, to an action brought against the executor for a debt due from the testator; for I find the rule universally laid down, that, *after* payment of the debts of the testator or intestate, it is the duty of the executor or administrator to pay the legacies." If, in any case, the payment of legacies could be an answer to an action for a debt due from a testator, it could only be, where there has been a laches on the part of the creditor. *Vernon v. Lord Egmont* (e) decided, that, where there is a contingent debt, a court of equity will not enforce a payment of legacies, upon the principle, that an executor may call for an indemnity. *Norman v. Baldry* (f) resembles the present case, except that there was an actual

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(a) 1 Esp. 275.  
(b) Ambler, 160.  
(c) 3 Merivale, 547.

(d) 2 M. & Scott, 7; 9 Bing. 8.  
(e) 1 Bligh. N. C. 571.  
(f) 6 Sim. 621.

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debt. In *Pearson v. Archdeaken* (g), it was held, that the payment of legacies was no answer to the claims of a creditor. In that case, an action was brought on a covenant contained in a lease, granted by the assignor of the plaintiff to the deceased, and the breaches in respect of which the executor was sued, took place many years after the testator's death. But it is not necessary here to carry the argument to that extent, because the principal is still in the hands of the executor. It is true, that, if the present legatees had filed their bill in a court of equity against the defendants, as trustees, alleging misconduct in that capacity, the defendants could not say that they held, not as trustees, but as executors; because there would be evidence of a consent to hold as trustees; but, as regards the plaintiff, they still possess the funds in the character of executors. If this defence were available, it would only be, where there has been a laches on the part of the plaintiff, but here he has sued as soon as the breach was committed; and there is no authority to shew that it was his duty to give notice of this liability.

Secondly, it will be contended, upon the part of the defendants, that they are not bound to indemnify the plaintiff, because the distress was unlawful, the lessor having parted with his reversion. *Thorn v. Woolcombe* (h) decided that, where a lessee demises, by way of underlease, for the whole of his term, such demise will operate as an assignment, because he has no reversion left; but, in the present case, the lessor is seised in fee; and, therefore, that authority is inapplicable. [*Parke, B.*—The second lease was a mere *interesse termini*. The reversion continued in the original lessor, until the commencement of the second term.

Sir *W. Follett*, for the defendants.—Where an executor acts in the due course of administration, he will not be liable to be sued for a claim, of which a creditor has neglected to give him notice. Many of the cases cited have turned upon the length of time which has elapsed before any claim was made. Here the testator died in 1820; the plaintiffs then held the bond, but gave no notice until 1835; and, in the interval, the executors administered the assets. Are, then, these payments to be disputed, by a creditor, who, for the first time, gives notice after the expiration of fifteen years? A distinction will be found between cases, where the legacies have been paid prior to a breach of the condition of the bond, and where they have been paid prior to notice. In *Nector v. Gennett* (i), Lord *Coke* says, "The difference is, when the obligation is for the payment of a lesser sum at a day to come; it shall be a good plea against the legatee, before the day; for it is a duty *maintenant* which is in the condition; but otherwise it is, where a statute or obligation is for the performance of covenants, or to do a collateral thing; then, until it be forfeited, it is not any plea against a legatee; for, peradventure, it shall never be forfeited, and may lie in *perpetuum*, and so no will shall be performed." There is no authority at law, that an executor, who has paid the legacies prior to notice of the existence of a specialty, is liable for so doing. The same principle applies to the payment of legacies as to the payment of simple contract debts. *Eeles v. Lambert* (k). *Hawkins v. Day* (l) is no authority that an executor, who has

(g) 1 Alcock & Napier, 23.

(h) 3 B. & Adol. 586.

(i) Cro. Eliz. 466; 2 Will. Exors. 831.

(k) Styles, 37; Aleyn, 38.

(l) Ambler, 160.

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paid legacies before notice, would not be protected. In *Williams on Executors*(m), it is stated, that Lord *Hardwicke* held, that, although payment by an executor of a simple contract debt, before any breach of the condition of a specialty, ought to be allowed as a good administration; yet the payment of a legacy, after notice of the specialty, and before a breach, was not a good payment. *Simmons v. Bolland*(n) proceeds upon the assumption that the executor had knowledge of the specialty, upon which he might afterwards be liable. Suppose, in 1824, a bill had been filed by the legatees against the defendants, would not the Court have compelled them to invest the money in the legatee's name, without any indemnity? In *Lord Egmont v. Vernon*(o), Lord *Gifford* considered that the executor incurred no liability by paying over the residue without an indemnity; though, under the particular circumstances, that decision was reversed in the House of Lords. Lord *Eldon*, in delivering judgment in *Gillespie v. Alexander*(p), says, "If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is debarred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit, and he cannot affect the executor at all." The remedy, then, against the executor is gone; and if the creditor sued him at law, *plene administravit* would be an answer. *Brooking v. Jennings*(q), and *Harman v. Harman*(r), shew that a payment of debts and legacies before notice of a specialty is protected. In *Davis v. Blackwell*(s), it does not appear that the executor had not notice of the covenant, but only that he had no notice of the breach of the covenant. There, *Tindal*, C. J., says, "I am not prepared to say that the payment of legacies would in any case afford an answer, in a court of law, to an action brought against the executor for a debt due from the testator; for I find the rule invariably laid down, that after payment of the debts of the testator or intestate, it is the duty of the executor or administrator to pay the legacies, and if the executor or administrator pay legacies before debts, he pays them at his own hazard, and not in a due course of distribution. I do not, however, say that lapse of time might not vary the situation of the parties, as in the case of *The Chelsea Water-Works Company v. Couper*." In *Pearson v. Archdeaken*, the executor had notice of the existence of the lease. If an executor *bond fide* administer the assets according to his knowledge, within a reasonable time after probate, he will not be liable to debts of which he has not received notice. The defendants, however, do not hold the property as executors, but in the character of trustees. "Where an executor, who happens to be also named a trustee of a legacy to be laid out in stock, has fully administered the estate and assented to the legacy, and retains the legacy in his hands, not as assets of the testators, but as trustee of the legacy, then the principle which would apply to another trustee, must apply to him; he is no longer clothed with the character of executor, but is as to the legacy a mere trustee."—*Williams on Executors*(t), *Byrchall v. Bradford*(u). If the defendants were to pay this claim, they would be guilty of a breach of trust.

Secondly, the judgment ought to be arrested. In *Bacon's Abridgment*,

(m) P. 960.

(n) 3 Merivale, 552.

(o) 1 Bligh. N. S. 558.

(p) 3 Russell, 136.

(q) 1 Mod. 174.

(r) 3 Mod. 115.

(s) 2 M. & Scott, 7.

(t) Vol. 2, p. 860.

(u) 6 Madd. 13.

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tit. Leases (N.), it is said, "If one having made a lease for life or years to A. of lands, after make another lease for years to B., of the same lands, or of the reversion of those lands, *habend'* the said lands or the reversion of those lands to the said B., *cum post sive per mortem, sive per resignationem, sursum redditionem, vel aliquo alio modo, vacare contigerit*; in this case B. hath election to take such lease either as a reversion or a reversionary interest, if he can prevail for an allotment of A., the tenant in possession; or if not, yet as a future *interesse termini*, such a lease will be good to take effect in possession upon the determination of the first lease. Hence it follows that the attornment by the first lessee to the second, would have the effect of passing the reversion to the latter; and if there was no such attornment, such lease would be good as an *interesse termini*. [*Parke, B.*—*Framlingham* is to take no interest until after the determination of the first lease; it amounts, therefore, to an *interesse termini*; and how can the effect be in such a case to pass the reversion?] Suppose a present lease is made for twenty years, and a second lease to commence when the first determines; if the first lessee attorns, the effect will be to grant away the reversion expectant on the first lease. [*Parke, B.*—No; the second lessee has nothing but an *interesse termini*; no reversion passed by the deed in question.] (x).

*Kelly*, in reply, as to the first point only.—It is conceded that in all cases where a legatee files a bill to enforce the payment of his legacy, and a contingent liability is shewn by the executor to be still outstanding, the courts of equity will decree an indemnity. The Statute of Distributions is, as it were, a statutory recognition of the same principle. That statute, 22 & 23 Car. 2, c. 10, s. 8, first provides that no distribution shall be made until after one year from the intestate's death, and that every person to whom a share shall be allotted, shall give a bond that, in the event of debts of the intestate coming to light, he shall pay back to the administrator his rateable share of the debt and costs of suits (if any), to enable the administrator to satisfy the debts. The words of the statute, therefore, require the administrator to take security from the next of kin, for their refunding in the event of after-discovered liabilities. The statute takes no distinction between the case of notice and no notice. There is throughout a perfect analogy between executors and administrators. A year is equally the limit to both; and it recognizes the principle contended for, that an executor may be liable as well as an administrator, when he pays away to legatees before the testator's debts are satisfied. The operation of refunding is to take place through the medium of the administrator; the statute does not direct that the legatees shall pay back to the creditors, but to the administrator. The bond given by the legatee is to the same effect. The law, therefore, throughout, contemplates a suit against the administrator. What difference is there between the case of an administrator and that of an executor paying, even under a decree of a court of equity? The real question is, will it be laid down in a court of law, that if a party fails to give notice, he is to lose his debt? [*Alderson, B.*—The real question is, whether the creditor's remedy is not in equity against the legatee, and not against the executor by reason of the omission to give notice?] No doubt it is a hard thing upon an executor to be called upon to pay a debt after he has

(x) Vide note to *Watkin's Conveyancing*, by Morley and Cook, p. 36.

already applied the assets under the decree of a court of equity; it must be recollected, however, that, in equity, steps are always taken which are equivalent to notice, viz., a reference to the master, accounts taken, and multiplied advertisements to bring before the Court all claims for outstanding debts. There are two classes of cases as regards executors; one, where an executor thinks fit boldly to pay over assets; the other, where a cautious executor calls on a legatee to take proceedings in equity. The former case is the present one. It is apprehended, that in no case can a creditor sue a legatee at law; an executor may; and it is through his medium alone that a creditor can recover at law. [*Parke, B.*—There is an authority in *Comyn's Digest, Administrator, C. 3.* “If he pays legacies, without security to refund, and a debt afterwards appears, it will be a *devastavit*.”] It will not be disputed, that, where an executor is sued, and obliged to pay, he may, in equity, recover a contribution from the legatees. This clearly arises from his liability to pay debts when discovered. A court of equity will follow the assets into the hands of a third party in favour of an executor. *Prima facie* the law is, that a creditor may sue an executor. The case in *Espinasse* is overruled by *Norman v. Baldry (a)*. Moreover, the defendant has still a full control over this money, and has never parted with it.

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LORD ABINGER.—The Court have made up their minds as to the reversion. On the other point they will take time to consider.

*Cur. adv. vult.*

LORD ABINGER, C. B., now delivered the judgment of the Court:—

This was an action against the executors of Sir Haylett Framlingham on a bond, which had been given by the testator to indemnify the plaintiff against any claim that might be made for the rent of some premises, of which he had taken an assignment. The pleas were, first, *plene administravit* before the commencement of the suit, and, secondly, *plene administravit* before any notice of the existence of the bond. Upon the argument two questions arose. The first, which was upon the face of the declaration, was, whether there was any power of distress, so as to justify the distress made for the rent, for the recovery of which this action was brought against the executors. It appeared that, during the continuance of a lease from Sir Thomas Wilson to certain parties, he granted another to Sir H. Framlingham, to take effect from the expiration of the first; and it was contended, that he had granted away the reversion immediately expectant on the first lease, and therefore had not the power of making any distress for rent in arrear under it. This point was raised, but not very strongly pressed, and the Court expressed an opinion, in the course of the argument, that there was no assignment of the reversion so as to prevent the power of distress; and, therefore, that the distress was lawful.

The next point was upon the plea set up by the executors, that they had fully administered. There were certain parts of the residue of the testator's estate which they had invested in their own names in the funds and on a mortgage, changing the security once or twice for the benefit of the residuary legatees, but which still remained in their charge; and the question was, whether they could be considered as having fully administered the estate, having, with-

(a) 6 Sim. 621.

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out notice of the claim of the plaintiff, paid all the debts and some of the legacies, and apportioned the remainder, as they considered, in satisfaction of the claims of the legatees, on whose behalf they had invested it in the funds. In this state of things, two questions arise; first, whether the executors could give in evidence any payments of legacies under the plea of *plene administravit*; and, secondly, whether, in this particular case, the money so invested remaining in their own hands, they could, as to that portion of the assets, sustain such a plea. There is no occasion for us to pronounce any opinion upon the first point, the Court being unanimously of opinion that they could not sustain the plea. Under the circumstances of this case, they are placed in the situation of having the complete control over the estate of the testator, which remained still in their hands, and which we consider not to be so apportioned by them in satisfaction of any legacies whatever as to bar the claim of a creditor on a specialty, who was entitled to satisfaction out of the testator's estate. We think, therefore, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

## HUTCHINS v. SCOTT.

By agreement dated 8th September, the defendant let to the plaintiff certain premises for seven years, at an annual rent, payable quarterly, the first payment to be made on the 25th of March then next following. Held, that the defendant could only distrain for one quarter's rent on the 25th of March.

A broker went to the plaintiff's house for the purpose of making a distress, when the plaintiff paid to him, under protest, the rent claimed and expenses of levy; upon which the broker withdrew, without seizing the goods or making an inventory. Held, that, in an action for an excessive distress, the landlord could not say that there had been no distress.

The defendant let to the plaintiff a house, described in the agreement as No. 38. After the execution of the agreement, and whilst it was in the plaintiff's possession, the number was altered to 35, but it did not appear by whom: No. 35 was, in fact, the house let. Held, that in an action for an excessive distress, the demise was admitted upon the plea of not guilty, and, that the altered agreement was evidence of the terms of the holding.

CASE for distraining on the plaintiff for 21*l.*, for rent, when 10*l.* 10*s.* only was due. Plea—Not guilty. At the trial, before Williams, J., at the Somersetshire spring assizes, the plaintiff put in an agreement dated 8th September, 1835, whereby the defendant agreed to let, and the plaintiff agreed to take, for seven years, a certain dwelling-house and premises, therein described as No. 35, Broad Street, from the 29th September then next, at the yearly rent of 42*l.*, payable quarterly, by even and equal portions, the first quarterly payment to be made on the 25th of March then next following. The distress was made for two quarters' rent, alleged to be due on the 25th of March, 1836. The evidence of the distress was, that the broker went to the premises, with directions to press for payment of the two quarters' rent, and in the event of the plaintiff refusing, to distrain his goods. The plaintiff, by the advice of his attorney, paid to the broker, under protest, 21*l.* for rent, and 3*l.* 3*s.* expenses; and the broker then withdrew, without having made any inventory. It also appeared, that, after the execution of the agreement, the number of the house had been altered from 38 to 35; the jury found the alteration made without the defendant's knowledge. It was objected, on the part of the defendant, that, by the terms of the agreement, half a year's rent was due; secondly, that the agreement was void by reason of the alteration; and, thirdly, that no actual distress was proved. The learned judge reserved the points, and the plaintiff had a verdict for 13*l.* 13*s.*

Erle, in Easter Term, moved to enter a nonsuit.—First, half a year's rent

was due when the distress was made. The meaning of the agreement is, that the quarter's rent due at *Christmas* is to be postponed until the 25th of *March*, when both quarters are to be paid. [Lord *Abinger*, C. B.—As the first quarterly payment is to be made at *Lady Day*, the previous quarter's rent is either given up or postponed to the end of the term. *Parke*, B.—The last rent would become due at *Christmas*, 1842. The only consequence is, that the lessor loses his remedy by distress for that rent, but he has a remedy on the contract.] Secondly, the agreement was void by reason of the alteration. Without the agreement, the plaintiff could not prove the amount of rent due, and therefore it was essential to support his case. Thirdly, there was no actual distress. No person remained on the premises, nor was there any inventory made out. *Swann v. Lord Falmouth* (a). It cannot be said that the goods were wrongfully seized. [Lord *Abinger*, C. B.—The defendant has taken three guineas as the costs of the distress, and he cannot afterwards say he did not distrain. *Parke*, B.—The plaintiff could not be bound to pay three guineas, unless there had been a distress; then the defendant admits that he levied. *Alderson*, B.—It is nothing more than an agreement not to go through the ceremony.]

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The Court having granted a rule upon the second point only,

*Bompas*, Serjt., and *Halcomb*, now shewed cause.—It is clear that No. 35 was the house intended to be conveyed. The alteration, therefore, does not vitiate the agreement, but carries into effect the intention of the parties. It was not made *animo cancellandi*, but only to correct a mistake. *Perrott v. Perrott* (b), *Hall v. Chandless* (c), *Bates v. Grabham* (d), *Motteux v. London Assurance Company* (e), *Bolton v. Bishop of Carlisle* (f), *Rowe v. Archbishop of York* (g), *Sugden on Powers* (h). If it is intended to rely upon the ground of fraud, that question should have been left to the jury. *Minnett v. Gibson* (i). The cases as to the alteration of bills of exchange are applicable. In *Brutt v. Picard* (k), the bill was dated, by mistake, *January*, 1822, instead of *January*, 1823, and the agent of the drawer and acceptor, to whom it had been given to be delivered to the indorser, corrected the mistake by altering the figure 2 into 3, without their knowledge or consent; and it was held, that such alteration did not vacate the bill. *Kershaw v. Cox* (l), *Cole v. Parkin* (m), *Jacob v. Hart* (n), are to the like effect. There was no evidence that the alteration was made by the plaintiff; and it is questionable whether any alteration made by a stranger, though in a material part, vitiates the instrument. *Pigot's case* (o). [*Alderson*, B.—If a deed be executed with blanks, which are afterwards filled up, it is void, though it is in furtherance of the original intention of the parties.] The reason is, that, upon the plea of *non est factum*, it cannot be said to be the same deed that was executed. But, secondly, assuming that the alteration avoided the deed, the fact of tenancy stands admitted on the record.

(a) 8 B. & C. 456; 2 M. & R. 534.

(b) 14 East, 423.

(c) 4 Bing. 123; 12 Moore, 316.

(d) Salk. 444.

(e) 1 Atk. 545.

(f) 2 H. Black. 259, 261.

(g) 16 East, 86.

(h) 5th ed. 412.

(i) 3 T. R. 481.

(k) 1 R. & M. 37.

(l) 3 Esp. 246.

(m) 12 East, 471.

(n) 6 M. & S. 143.

(o) 11 Co. 26 b.



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The plea of not guilty puts in issue the wrongful act only, and not the inducement. Here the inducement is, that the plaintiff held and occupied certain premises as tenant to the defendant at a certain rent. To prove the amount of rent, it was necessary to produce the agreement; and even supposing it good, it would, upon this issue, be inadmissible to shew the terms upon which the premises were held. *Doe d. Beanland v. Hirst (p)*.

*Crowder, contra*.—The agreement, as it originally stood, shewed a demise of No. 38, whereas the distress was in No. 35. The only evidence of a contract reserving rent was that agreement, which did not appear to have been out of the plaintiff's possession; and when it was shewn that an alteration had been made, it must be presumed to have been done by him. In *Markham v. Gonaston (q)*, an insertion of words in a bond by the obligor's servant, although by his consent and for his benefit, was held to avoid the instrument; and *Fenner, J.*, there cites a case in which an alteration in a lease as to the amount of rent had the same effect. The like doctrine is found in the second resolution in *Pigot's case (r)*. If the law were not thus strict respecting the alteration of deeds, the whole danger of admitting parol evidence to vary written documents would be introduced. The cases cited relating to the alteration of bills of exchange turned upon the provisions of the Stamp Act; and the question has there been, whether or no the alteration made the bill a new instrument. It will also be found, that, in those cases, the alteration was made with the consent of the parties. [*Alderson, B.*—It is difficult to understand why the alteration by a stranger should avoid the deed, unless the alteration makes it doubtful what the deed originally was, and what the parties meant. Lord *Abinger, C. B.*—Suppose a stranger destroyed, instead of altering it.] In *Rippiner v. Wright (s)*, it was held, that parol evidence could not be given, even of an unstamped agreement which had been destroyed by the wrongful act of the party who took the objection.

If the agreement was void, it could not be received in evidence for any purpose. To hold it admissible, would be to sanction a most dangerous principle, namely, that a deed wrongfully altered may be brought into court to establish the right of the party out of whose hands it comes in its altered state. It is but one step further to say, that the plaintiff might give parol evidence though there is a written demise. The alteration avoids the instrument for every purpose. *Master v. Miller (t)*, *Cowie v. Halsall (u)*. Suppose the declaration had alleged a demise of No. 38, and the agreement had been produced as it originally stood, the declaration would not have been supported by evidence of a distress at No. 35. The only case in which the courts will allow of parol evidence in the construction of written instruments, is for the purpose of explaining some ambiguity.

Lord ABINGER, C. B.—I think there is no ground for making the rule absolute; nor do I think, when the case is rightly understood, that the question arises, whether an alteration, even by the plaintiff himself, ought to render the deed void. Suppose the deed void, the only consequence would be, that, if

(p) 3 Stark. 60.  
 (q) Cro. Eliz. 626.  
 (r) 11 Co. 27 a.

(s) 2 B. & Ald. 478.  
 (t) 4 T. R. 320.  
 (u) 4 B. & A. 197.

the plaintiff brought an action upon it, he could not support his interest in the premises. But the deed, though void for the purpose of conveying an interest, may yet be evidence *aliunde* of another fact. The very case put by Mr. *Crowder*, of a lessee altering the lease in the amount of rent for the benefit of the lessor, illustrates the principle. There the lease would be evidence of the amount of rent due for the bygone occupation. I think Mr. *Halcomb* has put the case upon the true ground. The declaration states the tenancy; that is not denied: it then alleges the distress; that also is not denied; and then it charges that the distress was excessive, which is the matter in issue. At the trial, a distress was proved in No. 35; all the evidence applied to that house; and it is not suggested that the landlord demised any other. To shew the amount of rent, the agreement is put in, and the attesting witness called. Now suppose the lease never to have been altered, and to stand No. 38, might not the plaintiff have shewn that the landlord had no house at No. 38, or any other circumstance to prove that No. 38 was an immaterial part of the description. Suppose the landlord, having but one house in *Broad Street*, had put a wrong number into the agreement; would not the tenant be at liberty to shew that there was no such number in the street. If the landlord said, "This lease does not apply to the house you occupy," might not the tenant say, "You let me into possession of No. 35, described in the agreement as No. 38; that agreement is binding as to all the other stipulations, and, as between you and me, is evidence of the terms upon which I hold No. 35." Again, supposing No. 35 was the house intended, I am of opinion that parol evidence was admissible to shew that 38 was inserted by mistake. Then the alteration does not avoid the deed, or prevent it being evidence of the terms upon which the plaintiff held No. 35. If it were suggested that the defendant had any other house, the case might be different; but we must take the facts to be, that the parties *bond fide* intended No. 35 to be the house let. The cases on bills of exchange are not analogous; for, no doubt, if they are not properly stamped, they cannot be given in evidence. Here, whether the agreement was altered by a stranger or the plaintiff was of no importance, unless the defendant could shew that there was some other house to which it applied. We may decide this without interfering with the older decisions; for there is no occasion to raise the general question. Undoubtedly, the old law was more strict than it has been in modern times. Formerly, there was no such thing as a party claiming title under a deed of which he did not make profert; and it was an invention of pleaders, growing out of a decision of Lord *Mansfield's*, to allege, as excuse for profert, the loss of a deed by time or accident, and to raise the prescription of a grant from long possession and enjoyment. How is that consistent with the old authorities, which state that any alterations even by a stranger avoids the deed? If it be so altered as to leave no evidence of what it originally was, that may prevent any party from using it; or if it be altered in a material part by a party taking a benefit under it, that may prevent him from claiming an interest under it. Here, however, it is sufficient to decide that this agreement is evidence to prove the terms of the holding; and it is clear the contract had no relation to any other house but No. 35.

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**BOLLAND, B.**—I am of the same opinion.

**ALDERSON, B.**—This is an agreement, and the rules as to deeds are not ap-

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plicable.—The question is, what house was intended in the agreement? It is clear they meant No. 35; and if it had remained No. 38, I think it was admissible in evidence.

GURNEY, B., concurred.

Rule discharged.

### DOE dem. REES v. WILLIAMS and Wife.

S. being seised in fee of certain freehold property, and being absolutely entitled to certain leasehold property, devised the freehold to his wife, C. S., in fee, and the leasehold to her during the lives of J. and D S., and if they should survive her, to her heirs. C. S., by her will, devised all her property to T. T. and E. D., in trust, to pay an annuity to M. D. She also gave a legacy to W. J., and certain yearly sums to her grandnieces during their apprenticeship. She appointed her trustees executors, and directed that, after payment of her debts, the residue of her property should be equally divided between her said two grandnieces. C. S. died in 1792, when the two grandnieces commenced receiving the rents and profits, subject to the annuity. In 1814, E. J. married, and died in 1815. Upon her death the defendant entered into possession and received the rents of her moiety. The annuity to M. D. ceased in 1804, and the legacy to W. J. was paid in 1812. *Held*, that, under the will of C. S., the legal estate in the freehold property vested in the trustees, and that the Court could not presume a reconveyance. *Held*, also, that, as the lessor of the plaintiff had not shewn that the lease to J. S was not a lease for lives to him and his heirs, he had not made out a title to the leasehold estates.

**EJECTMENT** to recover possession of a freehold dwelling-house and premises, and a moiety of three leasehold cottages, of two leasehold fields and of a leasehold barn, all situate in the parish of *St. Mary Kidwelly*, in the borough of *Kidwelly*, in the county of *Carmarthen*. The cause was tried before *Williams, J.*, at the *Carmarthen* spring assizes, 1836, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case:—

*John Stephens*, being seised in fee of the entirety of the freehold hereditament whereof a moiety is in question, and being absolutely entitled to the entirety of the leasehold estate whereof a moiety is in question, under a lease granted to him by a Mr. *Pemberton*; by his will, duly executed and attested, dated the 31st of *March*, 1795, devised as follows:—

“I give and bequeath unto my well-beloved wife, *Catherine Stephens*, all that house, gardens, messuages, lands, and tenements, situate, lying, and being in *Lady Street*, in the borough of *Kidwelly*, and county of *Carmarthen*, in as ample a manner as they are by me now enjoyed, which house, gardens, messuages, lands, and tenements were part and parcel of lands bought by me of *W. O. Brigstoke, Esq.*; and it is my further will, that the said *Catherine* shall possess, own, and enjoy the same, she and her heirs, executors, and assigns, for ever, to be disposed of as she or they shall think fit. And I do likewise bequeath the lease of Mr. *Pemberton's* lands, houses, and barn to my beloved wife, *Catherine Stephen*, during the lives of *John* and *David Stephen*, if they should survive her, and afterwards to her heirs, whom she shall fitt(a) during the said lease. And as to whatever elae I shall die possessed of, the marriage settlement made between me and the said *Catherine* the 19th day of *July*, 1773, shall continue in full force, without any infringement, alteration, or change whatsoever. In witness,” &c.

The testator died soon after the date and execution of his will, leaving his wife *Catherine* surviving him, who thereupon took possession of the freehold and leasehold estate of her husband, and continued in such possession till her death.

On the 25th of *September*, 1799, *Catherine Stephens*, by her will, duly executed and attested, devised as follows:—

(a) *Sic.*

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"All my property, real and personal, whatsoever and wheresoever, either in possession, reversion, remainder, or expectancy, I give and bequeath unto Mr. *Thomas Taylor*, of the borough of *Kidwelly*, in the county of *Carmarthen*, and Mrs. *Eleanor David*, of the *Yarmouth Arms*, in the said borough, in trust, in and for the uses following, viz.: I give and bequeath the houses, lands, and appurtenances I hold and am possessed of by the last will and testament of the late *John Stephens*, my husband, deceased, into the hands of the said *Thomas Taylor* and *Eleanor David*, to pay the sum of 2*l.* of sterling *English* money, viz., 10*s.* on the first quarter day which is next after my decease, and so continue every three months to *Margaret Davies* during the natural life of the said *Margaret Davies*, and no longer. And I also give and bequeath to *William Jenkins* of *Hendgrass*, in the parish of *Llanasthney*, in the county of *Car-marthen*, the sum of 10*l.* of lawful money of *Great Britain*, to be paid in six months after my decease. And whereas my grandniece, *Catherine Jones*, is now apprenticed to *Catherine Edwards*; in consideration thereof I leave 10*l.* a-year to be paid to the said *Catherine Edwards*, milliner and mantua-maker, of the borough of *Kidwelly* aforesaid, in regular quarterly payments, for the time of her apprenticeship, ending the 10th day of *July*, 1801; and, after the expiration of her apprenticeship, the said *Catherine Jones*, her heirs, executors, and administrators, upon attaining years of discretion, shall by herself receive the sum of 5*l.* of lawful money of *Great Britain*, and in the mean time receive the same by the executors of this will every year by regular quarterly payments. And I also give and bequeath unto my grandniece, *Elizabeth Jones*, the sum of 4*l.* of lawful money of *Great Britain*, to be paid her at four regular quarterly payments, every year until she shall attain a suitable age to go to a proper apprenticeship; and that the sum of 4*l.* 4*s.* be paid for such apprenticeship, and the sum of 10*l.* for the first year, and the sum of 10*l.* also for the second year of such apprenticeship, and also the sum of 5*l.* in the year to her the said *Elizabeth Jones* in regular quarterly payments, the same as enjoyed by her sister, *Catherine Jones*, to her and her heirs for ever. And I hereby constitute and appoint the above-mentioned *Thomas Taylor* and *Eleanor David* executors of this my will, as well as guardians of my two grandnieces, *Catherine* and *Elizabeth Jones*; and that, after all my just and lawful debts are paid, the residue of my personal and real property in possession, or to come into possession, of my said executors, be equally divided between my said two grandnieces, the legacies otherwise mentioned excepted."

In the month of *September*, 1779, *Catherine Stephens* died, without having revoked her will, leaving her grandnieces, *Catherine Jones* and *Elizabeth Jones* surviving her; and, a short time after her death, her said grandnieces entered into possession of the property so devised by the will of *Catherine Stephens* to the trustees, *Thomas Taylor* and *Eleanor David*, and received the rents and profits thereof to their own use and for their own benefit.

On the 6th of *October*, 1814, *Elizabeth Jones* married *John Lewis Rees*, the lessor of the plaintiff, she at that time being in possession and in the receipt of a moiety of the rents and profits of the freehold and leasehold property late of *John Stephens*, and her sister the said *Catherine Jones* being in possession and in the receipt of the other moiety. After the marriage, the lessor of the plaintiff entered into possession of his wife's moiety of the said freehold and leasehold property, and received the rents thereof during her lifetime.

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In the month of *September*, 1815, *Elizabeth*, the wife of the lessor of the plaintiff, was delivered of a living child, which soon afterwards died; and the wife also died about two months afterwards, leaving her husband surviving; and upon her death the defendants took possession of the whole, and received both moieties of the rent to their own use, and up to the commencement of this action continued in possession.

The annuity bequeathed to *Margaret Davies* by the will of *Catherine Stephens* was paid to her during her lifetime, and she died in the year 1804; and the legacy bequeathed to *Thomas Jenkins* was paid to him about the year 1812.

*John Stephens* and *David Stephens*, named in the will of *John Stephens*, the testator, are still living.

It was argued at the trial, that if this Court should be of opinion that, under the circumstances, the jury ought to have been directed to presume a conveyance from the devisees in trust under the will of *Catherine Stephens*, the parties should be in the same situation as if the jury had found that that conveyance had been made at the time at which the Court should consider such presumption to have arisen.

The question for the opinion of the Court, is, whether the lessor of the plaintiff is entitled to recover one moiety of the freehold or of the leasehold estate late of the testator, *John Stephens*. If the Court shall be of opinion that the plaintiff is entitled to recover a moiety of the freehold estate and a moiety of the leasehold estate, then the verdict to stand; if they shall be of opinion that the plaintiff is entitled to recover a moiety of the freehold, but not a moiety of the leasehold, then the verdict to be confined to the moiety of the freehold; but if the Court should be of opinion that the plaintiff is not entitled to recover any part, either of the freehold or of the leasehold estate, then a verdict to be entered for the defendant.

The following memorandum appeared in the margin of the case:—"The question is, whether the lessor of the plaintiff is tenant by courtesy of his late wife's moiety of the freehold property, and whether he is entitled by survivorship in his marital right to her moiety of the leasehold property."

*J. Wilson*, for the plaintiff.—Different questions arise as to the freehold and leasehold estates. With respect to the freehold, it is clear that *Catherine Stephens* took an estate in fee under her husband's will. Under her will her grandnieces took as tenants in common in fee. If, then, they were ever seised of a legal estate in fee, the lessor of the plaintiff would be entitled to a moiety as tenant by the courtesy. *Jones v. Lord Say and Seal*(b), *Doe d. White v. Simpson*(c), *Doe d. Player v. Nicholls*(d), are authorities to shew that an estate in trustees is limited to the period necessary for the execution of the trusts. Here the trusts were executed in 1812, when the legacy was paid to *Jenkins*.

Then, as to the leasehold estates, it does not appear whether it was for lives or for years; but, in either case, the plaintiff is entitled to recover. If for years, the lessor of the plaintiff is entitled in right of his wife to a moiety, and his not having taken out administration will not affect that right. If the

(b) 8 Vin. Ab. 262, p. 19.  
 (c) 5 East, 162.

(d) 1 B. & C. 336.

lease were for lives, it must be taken, on the face of it, to have been granted to *John Stephens* alone, in which case it would vest in his executrix.

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*Chilton*, for the defendant.—With respect to the leasehold estate it is clear the plaintiff cannot sustain the verdict. If it were a lease for lives in the ordinary terms, it is admitted that he cannot; if it were for years, it is necessary that administration should have been taken out.

Then, as to the freehold, the trustees took a legal estate in fee for the purpose of dividing the property among the grandnieces. In *Kenrick v. Beauclerk* (e), there was no devise of the real estate to the trustees, but it was subject to the payment of debts by them out of the personal estate. The case most resembles *Booth v. Field* (f), where the testator devised all his lands to trustees, their heirs and assigns, for ever, upon trust, to pay the rents and profits to the separate use of his eldest daughter for life, and after her decease upon trust to convey the same to the use of such person, and for such estates, as she by her will should appoint, and, in default of appointment, to the use of her right heirs; and it was held, that the trustees took an estate in fee simple in the lands devised. So here the trustees are to make a division of the property between the grandnieces, and to convey to each their respective portions. Then the next question is, could the jury have been warranted in presuming that such division had been made? The facts stated in the case negative such presumption, as the grandnieces received the rents and profits during their lives. *Doe d. Beozley v. Woodhouse* (g) and *Anthony v. Rees* (h) are additional authorities that the legal estate vested in the trustees.

*Wilson*, in reply.—The question is, whether the trustees have any duty to discharge which would give them the legal estate; and, if so, for what duration? The Courts have not considered the legal estate as vesting in the trustees, unless it be absolutely necessary for the performance of the trusts. 2 Will.'s Saund. 11, n. 17; *Kenrick v. Beauclerk*; *Doe d. Woodcock v. Barthrop* (i).

A charge for debts is not sufficient to vest the legal estate in the trustees, unless the trustees at the same time take some active part in the payment of the debts. 8 Vin. Ab. 262, p. 19; *Doe d. White v. Simpson* (k). Here the only duty the trustees had to perform was to pay the annuity to *Margaret Davies*, and that ceased in the year 1804. [Lord Abinger, C. B.—The testator bequeaths his property to trustees to pay his debts, and, after his debts are paid, the residue of the real property is to be equally divided among the grandnieces. By whom is it to be divided? It is the same, in effect, as a direction to convey.] Those are the usual words where a testator intends to create a tenancy in common; it is to be equally divided under a decree of a court of equity upon a bill for a partition. There is nothing that requires the trustees to take more than a chattel interest until the annuity determined and the legacies were paid. *Doe d. Gord v. Needs* (l).

Then, as to the leasehold estate, if it were an estate for years, no administration would be necessary, as it would vest in the husband by survivorship. 1 Williams on Executors, 489. If it were an estate for life, it must be taken to be without any words of limitation; in which case it would vest in his executrix.

(e) 3 B. & P. 175.

(f) 2 B. & Adol. 564.

(g) 4 T. R. 59.

(h) 2 C. & J. 75.

(i) 5 Taunt. 385.

(k) 5 East, 162.

(l) 2 M. & W. 129.

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Lord ABINGER, C. B.—There can be no doubt, as to the leasehold estates, that our judgment ought to be for the defendant. If it had been found specifically stated that the lease was for years, the case might be difficult; but the probability is that it was for lives. As to the freehold estate, the question turns upon whether the trustees took the legal estate, and for what time. On that point we will take time to consider.

*Cur. adv. vult.*

Lord ABINGER, C. B., delivered the judgment of the Court.—This was an action of ejectment to recover certain freehold and leasehold premises. So far as respects the leasehold, the Court, at the time of the argument, were of opinion that there must be judgment for the defendant. The only point, then, is as to the freehold estate. The question is, whether or no the executors of *Catherine Stephens*, who were also trustees, took the legal estate. The will is somewhat obscure; but, upon the whole, the Court are of opinion that the legal estate vested in the trustees; therefore this ejectment cannot be maintained by the lessor of the plaintiff, unless the liberty be exercised by the Court, of presuming a conveyance of the legal interest from the trustees to the lessor of the plaintiff. We cannot make that presumption, because the fact is, that for fifteen years after the death of his wife, the lessor ceased to make any claim of interest in the estate, and the defendant has been in possession up to the present time. It was never yet laid down to any jury, that they ought to presume a conveyance against the actual possession and enjoyment. The Court are of opinion, that the trustees are possessed of the legal estate for the purpose of executing the will; and that this ejectment cannot be maintained.

Judgment for defendant.

### WRIGHT v. LAINSON and another, Sheriff of Middlesex.

In an action on the case against the sheriff for a false return of *nulla bona* to a writ of *fi. fa.*, the plea of "not guilty" only puts in issue the fact of the sheriff having the money in his hands, and making the return alleged.

An I O U, bearing date before the bankruptcy, is no evidence of a petitioning creditor's debt, unless it is shewn to have been in existence before the bankruptcy.

*Semble*, that where, in an action against the sheriff for a false return, he sets up the bankruptcy of the debtor as a defence, the petitioning creditor, (who has not indemnified the sheriff,) is a competent witness.

CASE against the sheriff of *Middlesex* for a false return to a *fi. fa.* The declaration stated, that theretofore, to wit, on the 30th of *August*, 1836, the plaintiff obtained final judgment in the Court of King's Bench in an action of debt against one *Joseph Hayes* for 200*l.* debt, and —*l.* damages; that the plaintiff sued out a writ of *fi. fa.* directed to the sheriff of *Middlesex*, commanding him to levy of the goods and chattels of the said J. H. the debt and damages aforesaid, and to have the money before our lord the king at *Westminster* immediately after the execution of the said writ; that the writ was duly indorsed to levy the sum of 78*l.* 2*s.* 6*d.*, and delivered to the defendants as sheriff of *Middlesex*; by virtue of which said writ the defendants, as such sheriff, afterwards, to wit, on the day and year aforesaid, seized and took in execution divers goods and chattels of the said J. H.

*Breach*—That the defendants, being such sheriff as aforesaid, not regarding their duty in that behalf, had not the money so levied, nor any part thereof,

before our lord the king, according to the exigency of the said writ, but therein wholly failed and made default; and that the defendants, after the said levy, to wit, on the day and year aforesaid, falsely returned to the said writ that the said J. H. had not any goods and chattels in the bailiwick of the said sheriff whereof they the defendants could cause to be levied the debt and damages aforesaid, or any part thereof.

At the trial, before Lord *Abinger*, C. B., at the sittings in *London* after last *Hilary* Term, the plaintiff having proved a *prima facie* case, the defendants contended they were entitled to shew that *Hayes* had committed an act of bankruptcy before the return of the *fi fa.*, and, therefore, that the property vested in his assignees; and, consequently, that the defendants had made no false return. The learned judge received the evidence, giving the plaintiff leave to move to enter a verdict for 78*l.* if the evidence was inadmissible.

In order to prove a petitioning creditor's debt, the defendants tendered in evidence certain I O U's which were in the bankrupt's handwriting, but were in the petitioning creditor's possession. They also called the petitioning creditor, (who had not indemnified the sheriff,) to prove the same facts. This evidence was admitted, reserving the like liberty to the plaintiff. The jury found for the defendants.

*Bompas*, Serjt., having obtained a rule according to the leave reserved,

*Alexander, Butt*, and *C. R. Kennedy*, shewed cause.—First, this defence was admissible under the plea of not guilty. It will depend altogether upon the construction of the new rule of pleading, Hil. T. 4 W. 4, (IV. I.) which orders, "that in actions on the case, the plea of not guilty shall operate as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." The question will be, therefore, what is *inducement* in the present declaration? That, it is contended, can only be *inducement* which the plaintiff states as a preliminary in order to shew the wrongful act of which he complains; and on that principle the *inducement* ends, in this case, with the averment of the delivery of the writ to the sheriff. The example given in the rules of an action against a carrier, will serve to illustrate this position. The plea of not guilty is directed in that case to operate as a denial of the loss or damage, and not of the *receipt*, of the goods by the defendant, or of the purpose for which they were received. There is also an example in the case of sheriffs in an action for an escape. There the general issue will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. Now if it were intended that the *arrest* could not be denied under the general issue, the framers of the rules were guilty of a great omission. The inference is, therefore, that it is still traversable under the general issue; and, by analogy, the *seizure* here is also traversable. What, then, is to be considered a preliminary proceeding? It is submitted that all proceedings are preliminary which took place before the attaching of the duty, of the breach of which the declaration complains. The proper analysis of the declaration is, I delivered a writ to you, and you have failed to execute it. [*Parke*, B.—The delivery of the writ to the sheriff raises a duty, viz. to look after the goods of the defendant; but it does not raise the duty for which you contend, viz., the paying over of the proceeds. Try the question in this way: would the declaration have been good if every thing about the *return* was omitted? If not,

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the gist of the action is the *falsehood* of the return, which not guilty would put in issue. *Jones v. Clayton* (a).] The quality of the return, and not the mere fact of the return, is the real fact in the cause. Where the mere circumstance is one, as in *Frankum v. Earl of Falmouth* (b), there the general issue denies the single circumstance; but where the quality of the fact is put in issue, the the plea of not guilty will deny all the circumstances. *Thomas v. Morgan* (c), *Spencer v. Dawson* (d), *Lilley v. Price* (e), *Colton v. Browne* (f). In this last case, the indicting, the probable cause, and the malice, were put in issue. The substance of the present case is, the not bringing into court the money which was the proceeds of the sale of *Hayes's* goods. The sheriff would have a right to say, I never had *Hayes's* goods; but that would have amounted to the general issue; and the fact of their being or not being *Hayes's* goods forms a part of the general transaction. The character of the return, including all its circumstances, is, therefore, what the present plea puts in issue.

Secondly, the I O U's were admissible in an action by the assignees against the sheriff, as they amount to admissions by the bankrupt. The I O U's were dated before the act of bankruptcy; that date, in the absence of proof to the contrary, is conclusive. [Lord Abinger, C. B.—In my experience, even if a bill of exchange was produced, dated before the act of bankruptcy, it was necessary to give some evidence of its existence before the bankruptcy.] In *Taylor v. Kinlock* (g), Lord Ellenborough held, that the date of a promissory note made by the bankrupt was *prima facie* evidence of its existence before the act of bankruptcy. [Parke, B.—In a note to 2 Stark. Evid. 105, *Taylor v. Kinlock* is stated to have been ruled in conformity to a false report of a case on the northern circuit. It would be difficult to prove, on principle, that a date could be evidence.] In *Obbard v. Beetham* (h), Lord Tenterden admitted a promissory note in evidence upon proof of its existence before the docket was struck. In *Hunt v. Massey* (i), the point in issue was, whether the defendant had ratified, after he came of age, a contract entered into by him during infancy; the Court held, that a letter, written by the defendant, which contained such ratification, must, *prima facie*, be taken to have been written and issued at the time it bore date. In *Gleadow v. Atkin* (k), an indorsement on a bond admitting the receipt of interest, was presumed to have been written at the time it bore date. In *Smith v. Battens* (l), indorsements on promissory notes were held to raise a sufficient presumption that they were written at the time they bore date.

Thirdly, the petitioning creditor was admissible. It was proved that the assignees did not indemnify the sheriff. There was, therefore, no privity in point of interest as between the petitioning creditor and the sheriff. This verdict would not be evidence for or against the assignees in any future action against the assignees, as they were neither parties nor privies. Will the circumstance that the petitioning creditor gives a bond to the lord chancellor, produce a disability. The proviso in the bond under the 6 Geo. 4, c. 16, s. 13, is, that the petitioning creditor shall give a bond to

(a) 4 M. & S. 349.

(b) 4 Nev. & M. 330; 2 Adol. & E. 452.

(c) 2 C. M. & R. 496.

(d) 1 M. & Rob. 552.

(e) 5 Dowl. P. C. 432.

(f) 4 Nev. & M. 831; 3 Adol. & E. 312.

(g) 1 Stark. 175.

(h) Moo. & Malk. 486.

(i) 5 B. & Adol. 902; 3 Nev. & M. 109.

(k) 1 C. & M. 414.

(l) 1 Moo. & R. 341.

the lord chancellor in the penalty of two hundred pounds, conditioned for proving his debts as well before the commissioners as upon any trial at law, in case the due issuing forth of the commission be contested, and also the petitioning creditor's debt and act of bankruptcy, and the only cases in which the petitioning creditor can be sued on the bond is where there is no proof of any debt or of an act of bankruptcy, and also where the commission is shewn to have been sued out fraudulently or maliciously, and the penalty is, that the lord chancellor may assign the bond. What *trial* does this bond contemplate? It cannot mean every trial, but merely such trials in which the assignees are parties, or where an issue is directed to try the validity of the bankruptcy. *Green v. Jones* (m). [Lord Abinger, C. B.—It would exclude him in all cases where the act of bankruptcy incidentally came into operation. *Parke, B.*—I do not know that he may not be liable to be sued even in cases where the bond had not been assigned. Your argument goes too far, for it would make him a witness in all cases.] At all events, the mere *contingency* of being sued on the bond will not disqualify. *Carter v. Pearce* (n).

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*Bompas, Serjt., and Russell Gurney, contrd.*—The general issue does not raise the question of the bankruptcy, or render it admissible as a defence. The *inducement* comprises every statement which is antecedent to the default where-with we seek to charge the defendants. Thus in the example given of an action for an escape, viz. "that the general issue will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings," is proof of the meaning of the rule. There the allowing to escape is the only thing put in issue by not guilty, and all the other facts, including the arrest, are inducement. So here all the acts, including the *levy*, are merely *inducement*. No doubt a breach of duty would arise from not *seizing*; but that is not the breach of duty for which the plaintiff now proceeds. His statement is, that the defendants, having *seized*, and so done their duty so far, have been guilty of a further breach, viz. the omission to make a *proper return*. Even supposing the word "falsely" to be struck out, sufficient is averred to shew that the plaintiff had a cause of action; because it is plain that the defendants did act "falsely" in returning that they had *not* seized the goods, whereas in point of fact he *had*. In all the other cases cited, where not guilty has been held to put in issue more than the breach, it will be seen that there was no inducement involving a statement of different duties, as in the present case. In *Thomas v. Morgan*, the *scienter* was the very essence of the wrongful act complained of, which act was not the keeping of a ferocious dog, but keeping him knowing him to be ferocious. In *Spencer v. Dawson*, the wrongful act was the false warranty of soundness, the defendant knowing the horse to have been unsound; and *Parke, B.*, observes, that the only matter of inducement, in that case, was the bargain and sale. In *Cotton v. Browne*, to use the words of *Patteson, J.*, the whole matter alleged in the declaration is an act of injury, and therefore, of how many soever different acts it may consist, may be traversed under not guilty. The case of *Frankum v. Earl of Falmouth* is directly in point. It is plain that there the defendant could not have been said "wrongfully" to have diverted the plaintiff's water-course, unless the declaration shewed the plaintiff's "*right*" to it. Here the

(m) 2 Camp. 411.

(n) 1 T. R. 163.

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mere assertion of a false return would be insufficient; in order to maintain our case, we must shew and aver the judgment, the levy, and the false return. [As to the second point they were stopped.]

Thirdly, as to the competency of the petitioning creditor—No proposition can be more plain, that the petitioning creditor is inadmissible where his testimony goes to sustain the commission, because he is clearly in such case a witness for his own interest. Any investigation which, seen collectively, might have the effect of shewing that the bankruptcy was not sustainable, might have the effect of superseding it. The words of the act are very large: “any trial at law.” [Parke, B.—Suppose a wager between two indifferent parties, as to the validity of the commission, would a refusal by the petitioning creditor to give evidence, render him liable to a forfeiture of the bond?] The sheriff here is not an indifferent person; he is a stakeholder between the parties; and, if this case should be given in favour of the plaintiff, the sheriff will have a right to recover against the assignees. *Wilson v. Milner* (o). [Lord Abinger, C. B.—This verdict would be no evidence either for or against the sheriff.] No; but without it he could recover the levy money by shewing that he had paid it under a mistake. Moreover this verdict will decide the petitioning creditor’s title to the levy money, and, therefore, he has a direct interest. [In the argument the following cases were cited, *Esparte Osborne* (p), *Esparte Harcourt* (q), *Tomlinson v. Wilkes* (r).]

*Cur. adv. vult.*

LORD ABINGER, C. B. on a subsequent day delivered the judgment of the Court.—This was an action against the sheriff for a false return, and the declaration stated a judgment, the delivery of the writ, a levy, and a return of “*nulla bona*.” Plea—not guilty. At the trial, the plaintiff proposed to give evidence of a return of “*nulla bona*,” and contended that nothing else was in issue. The defendants, on the contrary, contended that they were entitled under this traverse to shew that the goods levied were not those of the bankrupt. We are of opinion, that, under the new rules, such evidence was inadmissible, and that all which was put in issue by the plea, was, the fact of the false return. The rule is, “that in actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence, than such denial, shall be admissible under that plea; all other pleas in denial shall take issue upon some particular matter of fact alleged in the declaration.” Inducement, in the terms of this rule, includes every thing which does not involve the special charge against the sheriff. The sheriff committed no breach of duty in executing the writ; he did in point of fact execute the writ; but then arises the breach of duty, viz., his neglecting to bring the money into court, and his false return, that there were no goods in the bailiwick. The breach of duty then consists of two parts; first, of the fact of not having the money in court; and, secondly, of making such a return. It occurred to me, at the trial, that all that was involved was the fact of a return, and that this was mere matter of record. Upon reflection, I think it is a matter of mixed law and fact; and these being blended

(o) 2 Camp. 451.  
 (p) 1 Rose, 387.

(q) 1 Rose, 203.  
 (r) 3 Brod. & Bing. 397.

together, must go to the jury. The plaintiff is entitled to recover; but as this is the first time the question has arisen, the Court will allow a new trial upon payment of costs with liberty to amend the plea.

Rule accordingly.

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GOODTITLE, dem. BAKER, v. MILBURN.

**EJECTMENT** to recover certain lands at *Uphill*, in *Somersetshire*. At the trial, before *Williams, J.* at the last Spring Assizes for *Somersetshire*, it appeared that one *Simon Payne*, by indentures of lease and release, of *December*, 1812, and of *July*, 1813, mortgaged to a person of the name of *Priest*, several lands, and, amongst others, two parcels of land, one called the *Warth*, and the other *Bennett's*. In the month of *August*, 1813, a local act, 52 G. 3, c. 102, was passed for inclosing lands at *Uphill*, in the county of *Somerset*, and this act contained clauses authorising exchanges to be made under certain restrictions: *Warth's* and *Bennett's* were, by the consent of *Simon Payne*, exchanged, under the provisions of the act, for two other pieces of land allotted to him, called *Horsington's* and *Richardson's*. On the 13th of *September*, 1813, *Payne* contracted to sell these two allotments, to a person of the name of *Gegg*, for 800*l.*; and in the month of *July*, 1814, the commissioners under the act, by *Payne's* authority, gave possession of the said allotment to *Gegg*. After being let into possession, *Gegg* paid to *Payne* 400*l.* on account of the purchase-money, and interest for the remaining 400*l.*, until *Gegg's* bankruptcy, which happened in 1826, when his assignees sold the allotments in question to one *Edgar*. *Simon Payne* was afterwards insolvent, and the defendant became his assignee under the Lord's Act, in 1831. An action was brought, after *Simon Payne's* death, by the defendant, to recover from *Edgar* the remainder of the purchase-money of *Horsington's* and *Richardson's*, and he recovered it in 1835. *Priest* died in 1820, and the lessors of the plaintiff, as his executors, brought the present action to recover *Richardson's* and *Horsington's*, relying on the local act already mentioned.

The 7th section enacts "that nothing in this act contained shall extend to authorize or enable the said commissioners to determine the title to any messuages, lands, tenements, or hereditaments whatsoever, nor to determine any right between any parties contrary to the possession of any such parties; but in case the said commissioners shall be of opinion against the right of the person or persons so in possession, they shall forbear to make any determination thereupon until the possession shall have been given up by such person, or recovered from such person by ejectment."

The 22nd section enacts, "that the said commissioners shall and may, from time to time, as they shall find convenient, deliver possession to the several persons interested in the several divisions and allotments hereby directed to be

By an inclosure act passed in the year 1813, the commissioners were empowered to set out, allot, and award any lands within the parish of A., in exchange for any other lands within that parish, provided (among other things) "such exchanges were made with the consent of the owner or owners, proprietor or proprietors, of the lands which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee simple, tail, for life or lives, terms of years absolutely, or for term of years determinable upon a life or lives," upon such consent; to be testified under his or their hand or hands in writing." Lands in mortgage had been exchanged under this act, and the award of the commissioners

set forth the consent of the mortgagor who remained in possession, but it did not appear that the consent of the mortgagee had been obtained: *Held*, that as the Court were not called upon to presume that the mortgagee had not given his consent, it was unnecessary to decide whether such consent was essential.

In ejectment by the mortgagee against the assignee, (under the Lord's Act,) of the mortgagor, *Held*, that a letter from the mortgagor to the mortgagee, dated before the assignment, as against the defendant, was *prima facie* evidence of having been written at the time it bore date.

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made and set out; and such possession, so delivered, shall be kept and retained by the several persons entitled thereto, against all persons whatsoever, although the award hereinafter directed to be made shall not, at the time of giving or delivering such possession, have been made or executed."

Section 24 provides "that it shall be lawful for the said commissioners to set out, allot, and award any lands, &c. within the parish of *Uphill*, in lieu of and in exchange for any other lands, &c. within the said parish or any adjoining parish, &c., provided that all such exchanges be ascertained, specified, and declared in the award of such commissioners, and *be made with the consent of the owner or owners, proprietor or proprietors, of the lands, tenements, or hereditaments* which shall be so exchanged, whether such owner or owners, proprietor or proprietors, shall be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee simple, fee tail, or for life or lives, or for term or terms of years absolute, or for term of years determinable on life or lives; such consent to be testified in writing under the common seal of the body corporate, or under the hands of the other consenting parties respectively; and all every such exchange shall be good, valid, and effectual in the law, to all intents and purposes whatsoever."

Section 28 provides "that nothing in this act shall extend to revoke, make void, alter, or annul, any covenant, &c., or to prejudice any person having any right of dower, *incumbrance, or interest*, whatsoever, in, out of, upon, or affecting, any of the lands hereby intended to be divided, &c., or which shall be *exchanged*, or assigned in compensation for any other estate or right in pursuance of this act; but as well the lands allotted as the tenements which shall be exchanged or assigned, shall, immediately after such allotment, exchange, or assignment, be vested, remain, and enure; and the several persons to whom the same shall be assigned, allotted, or given in exchange, as aforesaid, shall thenceforth stand and be seised and possessed thereof respectively, and subject to the same bills, &c., *charges, and incumbrances*, as the several lands, &c., in respect whereof such allotments, assignments, and exchanges, shall have been made, should or would have been made subject or liable to, in case the same had not been allotted, assigned, and exchanged, and in case this act had not been made, &c."

At the trial, *Erle* proposed to read the following letter, from *Simon Payne*, dated *December 20, 1818*, which was objected to, by *Bompas*, Serjt., for the defendant, on the ground that there was no further proof, *except the date*, to shew the existence of the letter before the defendant became assignee of *Payne* under the Lord's Act. It was admitted that no part of the letter (except the signature,) was in *Payne's* handwriting. The learned judge, however, allowed the letter to be read, which was as follows:—

"Sir—The two allotments which you claim in *Uphill Moor*, I certainly received from *Horsington* and *Richardson*, in exchange, under the inclosure act, for lands in the mortgage to you; and some time since I agreed to sell them to Mr. *Gegg* for 800*l.*; he paid me 400*l.* and was let into possession, and is still in possession. I have no objection to your receiving the other 400*l.* from him, on his completing his purchase, if you will pay me 100*l.* of it for my present purposes, and the rest can go towards the payment of the interest now due to you on the mortgage debt; but you must join in the conveyance to *Gegg*, as he will not accept a conveyance from me alone. *S. Payne.*"

"To *W. Priest*, Esq. *Dec. 20, 1818.*"

No consent of *Preest* was shewn to the exchange under the local act.—  
The jury having found for the plaintiff—

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*Bompas*, Serjt., obtained a rule to set aside the verdict and enter a nonsuit, on the ground that in the absence of the consent of the mortgagee to the exchange, there was not a consent *by the owner* within the meaning of the local act; and also on the ground that the date of the letter was no evidence of the time when it was written.

*Erle*, *Crowder*, and *Barstow* shewed cause.—The first question will be, is the mortgagor in possession “the owner,” so as to be empowered to give consent. The mortgagee never having been in possession cannot be considered an “owner” within the 24th section; he, therefore, falls within the 28th section, and can only be considered an incumbrancer. [*Alderson*, B.—Taking the 24th and 28th sections together, it is plain that the mortgagor must be considered as the owner, and the mortgagee as the incumbrancer.] Before the commissioners, *Payne* claimed to be the owner of *Warth's* and *Bennett's*, and consented in writing to the exchange for *Horsington's* and *Bennett's*; he and those claiming with him are clearly estopped, therefore, from saying he was not the owner. Secondly, the letter was clearly admissible. It contains an admission, by the mortgagor, of a subsisting mortgage, so as to rebut the presumption of payment arising from a possession of twenty years. *Gleadow v. Atkin* (a). It likewise contains a statement against the interest of *Payne*, and is therefore evidence against him and those claiming under him. It was objected that the letter might have been written after the assignment to the defendant, for the purpose of prejudicing his rights; it must, however, be presumed (from the fact of its being dated prior to the assignment,) that it was in existence previously, unless evidence to the contrary is given; *Hunt v. Massey* (b), *Smith v. Battens* (c), *Taylor v. Kinloch* (d), *Obbard v. Beetham* (e). The letter, although admissible, was superfluous, as between mortgagor and mortgagee there could be no adverse possession; *Hall v. Doe d. Surtees* (f).

*Bompas*, Serjt., and *Ball*, *contrà*.—It is not necessary to dispute the law, as laid down in the case of *Hunt v. Massey*; inasmuch, as that case differs from the present in this;—that here the signature to the letter only, and not the date, is in *Payne's* handwriting. Besides, here the assignee under the Lord's Act, is an assignee for a valuable consideration. [Lord *Abinger*, C. B.—Still he stands exactly in *Payne's* shoes.] If the letter had been written after the assignment, it would clearly be inadmissible; it, therefore, was incumbent on the plaintiff to shew that it was written before. In the case of *Wright v. Lainson*, decided in this court, one of the points for argument was, whether certain I O U's which bore date before an act of bankruptcy, were admissible in evidence to prove a petitioning creditor's debt due before the bankruptcy; and the Court held that they were not. [Lord *Abinger*, C. B.—No. The distinction is this; in the case of assignees of a bankrupt, they are bound to prove that a bill of exchange in their own possession which they use for the

(a) 1 C. & M. 410.

(b) 3 Nev. & Man. 109; 5 B. & Adol.  
902.

(c) 1 Moo. & R. 341.

(d) 1 Stark. N. P. C. 175.

(e) M. & Mal. 486.

(f) 5 B. & Ald. 687.

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purpose of supporting their own title as assignees, was in existence previous to the bankruptcy. Here on the contrary, the lessors of the plaintiff produce this letter as evidence against the assignee of the insolvent, whose letter it is.]

Secondly.—As to the 24th section, it gives no authority to convey under these circumstances. The mortgagor must shew that he had a legal title. He is neither owner, tenant in fee simple, fee tail, for life, or years, within the above section. [*Alderson, B.*—Does not the expression “tenant for years,” shew what kind of “ownership” is meant?] The case of *Wingfield v. Thorp(g)*, shews that the words must be construed strictly. If, therefore, the mortgagor is not owner within the specific words of this act, his consent is not sufficient. If it be construed that a mortgagor is an owner, it will go the length of allowing every mortgagor to get rid of his lands by exchange; and, as it has been held, that money may form part of the equivalent, a mortgagor may take a few acres in exchange, and the remaining value in money. [*Alderson, B.*—This act says the new lands shall be liable to the incumbrance; it does not go on to say the whole lands shall be exonerated. This is nothing more than the provision of the General Inclosure Act, 41 Geo. 3, c. 109, superadding a clause to make the new lands liable. *Lord Abinger, C. B.*—The 7th section enjoins that the commissioners are not to decide any thing contrary to the *possession*. We must see, therefore, whether the word “owner” is to be construed in its legal or popular sense.]

*Cur. adv. vult.*

*Lord Abinger, C. B.*, now delivered the judgment of the Court.—We have looked to the case of *Wingfield v. Thorp*, to which my brother *Bompas* referred us. We think it does not support the position for which it was cited. We are of opinion that the plaintiff is entitled to recover. It is not necessary to say whether, under this inclosure act, the consent of the mortgagee is or is not required. There is nothing in this case to shew that it was not obtained; and as it must be presumed that the commissioners have done their duty, we cannot, until proof is given to the contrary, assume that the mortgagee was not a consenting party. They were not bound to set forth in their award all the authorities they had; they have shewn the consent of the mortgagor, *non constat*, that they may have had that of the mortgagee. The mortgagor acts as if the consent of the mortgagee had been obtained. The letter also was clearly admissible as of the date which it purports to bear; and in that the mortgagee is clearly referred to a transaction between him and the mortgagor, which implied that every thing was rightly done; in fact, it speaks in express terms of the sale of exchanged lands. For these reasons, we are of opinion that the plaintiff is entitled to recover.

Rule discharged.

## EDMONDS v. GROVES.

**A**SSUMPSIT on a promissory note for 30*l.*, drawn by defendant, payable to one *Joseph Cannon*, and indorsed to plaintiff.

*Plea*—The defendant says, that the said promissory note in the said declaration mentioned was made by the defendant for the reimbursing and repaying to the said *Joseph Cannon* money, to wit, 30*l.*, theretofore, to wit, on the 8th day of *February*, in the year of our Lord 1837, knowingly lent and advanced to the defendant, by the said *Joseph Cannon*, for the purpose of enabling the defendant to game by playing at a certain game, to wit, the game of roulette, contrary to the form of the statute in such case made and provided, and for no other consideration whatever; and with which said money so knowingly lent and advanced as aforesaid, the defendant did then game by playing at the said game, against the form of the statute. And the defendant further saith, that the said promissory note was indorsed by the said *Joseph Cannon* to the plaintiff, as in the said declaration mentioned, with full knowledge and notice of the premises in this plea mentioned, and without any consideration or value having been given for such indorsement or for the said promissory note to the said *Joseph Cannon* by the plaintiff, or by any other person whatsoever; and that the plaintiff hath always held, and still holds, the said note, without having given any value for the same. Verification.

*Replication*—That the said *Joseph Cannon* indorsed the said promissory note to the plaintiff upon and for good and valuable consideration, and the plaintiff held, and still holds, the same for such consideration and value; and that, at the time he took and received the said note, he had no knowledge or notice of the premises in the said plea mentioned. And this, &c.

At the trial, before Lord *Abinger*, C. B., at the last *Middlesex* sittings, neither party offered any evidence, upon which his lordship directed a verdict to be entered for the plaintiff, on the ground that the proof of no consideration upon the pleadings rested with the defendant, and that, in the absence of such proof, the plaintiff was entitled to recover. His lordship, however, gave the defendant leave to move to set aside the verdict and enter a nonsuit, if the Court should be of opinion that, (inasmuch as the plaintiff, by his replication, had not traversed that the note was given for money lent at play,) he had not thereby admitted the illegality of the original consideration, and, consequently, ought to have begun by giving evidence of the value given by him.

*W. H. Watson* now moved accordingly.—The plaintiff was bound to have shewn consideration in the first instance. [*Alderson*, B.—The real question is, on whom is the affirmative of the issue? You plead no consideration, and it was incumbent on you, therefore, to prove it.] There were certainly cases in this Court in which it has been held, that where the issue raised has been, whether or not any consideration was given by the plaintiff, that was not sufficient to oblige the plaintiff to begin by proving consideration. These cases, however, were different from the present. They were cases of accommodation bills; the present is a case of a consideration altogether illegal. It is true that, by a recent statute, 5 & 6 W. 4, c. 41, it is enacted, that securities given

Assumpsit by indorsee against the maker of a promissory note. *Plea*, that the note was given for money lent at play, and that it was indorsed to the plaintiff, with notice, and without consideration. *Replication*, traversing the notice and want of consideration; and issue. *Held*, that the pleadings did not admit the illegality of the original consideration, so as to call upon the plaintiff, in the first instance, to prove that he had given value; but that the defendant ought to have given evidence of the illegality before he could throw such proof on the plaintiff.



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for considerations arising out of illegal transactions, (and, among them, securities within the statute of Anne, relating to gaming,) shall not be absolutely void, as they were before the passing of that act, but shall be deemed to have been given for an illegal consideration; that, however, it is submitted, does not alter the present question. [*Alderson, B.*—Is your plea good or bad without the averment that no consideration was given by the plaintiff? If the averment is a necessary one, you must prove it.] Suppose, before the recent statute, it had been shewn that the note had been given for an usurious consideration, or for any of the other considerations altered by the statute, the holder would have been obliged to shew consideration. [*Lord Abinger, C. B.*—The recent decisions in this Court have altered the old practice.] Suppose, at the trial, I had proved the total want of consideration, am I not to take the fact to be admitted on these pleadings, that the note was, in its inception, for money lent at gaming, so as to dispense with any necessity of proving that part of the plea. This very question arose in the case of *Noel v. Boyd* (a), but the Court came to no conclusion on the subject. The reporter puts a quære, “whether circumstances not denied on the record can be assumed to be true in point of fact, or whether they are admitted only so far as to exclude them from the issue.” I contend that the fact not denied must be taken to be admitted, with all its consequences. If that be so, here the pleadings admit the consideration to be an invalid one, and, for that reason, it was the duty of the plaintiff to have proved value in the first instance.

*LORD ABINGER, C. B.*—The rule must be refused in this case. According to the recent decisions in this Court, it was incumbent on the party relying upon the illegality as a defence to have proved it; in fact, the *onus probandi* was thrown upon him. Here the defendant offered no evidence. In a case where the record, with all its circumstances, is open to the jury, very slight evidence may enable them to come to the conclusion, from the original inception of the instrument, that the plaintiff was a party to its concoction, unless he plainly proves that he has *bond fide* given value. Here, however, upon the issue raised, the question is, ought not the defendant to have given evidence in support of his averment, and so connect the holder with the parties privy to the original making of the note? This the defendant has not done. As to the effect of the admissions on the record, I express no opinion, as I think the defendant was bound to give proof of the issue upon which he relied.

*ALDERSON, B.*—In this case the defendant pleads a gaming transaction. (Here his lordship recapitulated the pleadings.) The allegation that it was indorsed by a third person to the present holder, with knowledge of the original circumstances, and without consideration, (the latter averments being traversed,) *Mr. Watson* calls an admission by the plaintiff of his cognizance of what passed between the defendant and third parties. I apprehend he is wrong in his idea of an admission. An admission, in my judgment, is only a waiver of requiring proof of those parts which are not denied; the party so waiving being content to rest his case upon the proof or disproof of the issue joined. If, however, the jury are to draw inferences, it must be from facts proved in the ordinary course.

(a) 1 Gale, 193.

Here the defendant, in not proving the fact that the plaintiff was acquainted with the original illegality in the concoction of the note, the plaintiff was clearly entitled to a verdict.

Rule refused.

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### TINLEY v. PORTER.

A RULE nisi had been obtained by *Creswell*, for an attachment against a person of the name of *Askeu*, for not attending as a witness at the last *Liverpool* assizes, he having been served with a *subpœna ad testificandum*.

The affidavit in support of a motion for an attachment for disobedience to a *subpœna ad testificandum*, must state that the party was a material witness.

*R. Alexander* now shewed cause, and contended, on the authority of *Taylor v. Willan*(a), that the affidavit upon which the rule was obtained did not contain a statement that the party was a material and necessary witness. It is again and again laid down, by the authorities, that it must be a perfectly clear case of contempt to call for the interference of the Court, in the shape of an attachment.

*Creswell, contrâ*.—The witness was served with a *subpœna*; it was his duty, therefore, to have attended, unless there had been a countermand. [Lord Abinger, C. B.—You have your remedy by action, as well as by attachment.] There are cases where an action would lie and an attachment would not apply, and *vice versâ*; where, however, a party has disobeyed the process of the Court, it is clearly a contempt, and therefore the Court is called upon to vindicate its own process. Moreover, there is nothing to shew that there was not perfect *bona fides* in summoning the party as a witness.

Lord ABINGER, C. B.—The case in the Common Pleas is an authority, that where a party has another remedy, he must shew, by his affidavit, that the witness was material.

PARKE, B.—We are bound by the decision of the Common Pleas; and, however novel the practice, we must respect its authority.

Rule discharged.

(a) 4 M. & Pay. 59.

### FILBEY v. COMBE.

THIS was an action to recover the value of dust, cinders, and ashes removed by the defendants from certain premises in their possession, in the parish of *St. Martin in the Fields*. The defendants pleaded four pleas, the third of which alone is material to the question in the case, viz. that the defendants burned certain coals in their brewery, in the parish of *St. Martin in the Fields*, and thereby the dust, &c. in the declaration were produced; and

Under the 57 G. 3. c. 29, ss. 59 & 60, the scavenger of a district is not entitled to the dust, ashes, &c., until they are, in the contemplation of the owner, rubbish or refuse.

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that, having occasion to use the said cinders, &c., at certain other premises in the parish of *St. Giles in the Fields*, they removed them thither, and having used them at the last aforesaid premises, they left such cinders, &c. on the last mentioned premises for the parties entitled thereto. Issue having been joined, the following case was stated, under a judge's order, for the opinion of this Court.

By the 57 Geo. 3, c. 29, s. 59, it is enacted, that the commissioners, trustees, or any other persons having the control of the pavements within the jurisdiction of the act, may agree with any person or persons to be the scavenger or scavengers of the streets and public places within the district; and such person or persons, on a certain day, in every week, and oftener, when required by any three or more of the commissioners and trustees, &c., shall bring convenient carriages into the public streets, and shall give notice of their approach, and shall take and carry away from the respective houses and premises of the inhabitants or occupiers, their soil, ashes, cinders, rubbish, dust, dirt, and filth, and all which the said scavengers shall take and carry away at their own costs and charges, upon pain of forfeiting a sum of 40s.; and it is also enacted, that if any person shall refuse to permit such soil, ashes, &c. to be taken away by the scavengers so appointed, every person shall forfeit 5l." Then follows a power to the commissioners to appoint different persons to collect and possess the soil, ashes, &c., as they shall deem expedient; "but that the right and benefit of such soil, ashes, &c., shall belong exclusively to the person or persons who shall be, by the commissioners as aforesaid, appointed to collect and possess the same, any thing in any local act of Parliament or in that act to the contrary notwithstanding."

The plaintiff is the contractor for cleansing the streets and public places in the parish of *St. Martin in the Fields*, in the county of *Middlesex*, with the commissioners having the control of the pavements within that parish. The defendants are brewers carrying on business as well in that parish as in the parish of *St. Giles's*. The latter premises are used by the defendants as a cooperage for cleansing and preparing barrels. In brewing, the small coals used in the furnace are occasionally raked into the ashes, in an unconsumed or but partially consumed state, and become mixed with the dust, cinders, &c., arising from the same fires. The small coals, being insufficient for brewing purposes, were removed by the defendants to their premises in *St. Giles's*, and there used for the purpose of heating water used in the cleansing of casks and barrels; after which the dust, cinders, and ashes, thence arising, were from time to time removed by the scavengers of *St. Giles's* parish.

*Godson*, for the plaintiff. This is in the nature of a parliamentary contract, whereby each inhabitant of the parish agrees to give to the scavenger of the district the dust and ashes arising from the consumed coal, in consideration that the scavenger will cleanse the street, and remove the dirt from before his door. [*Parke*, B.—Is any thing *refuse*, *dust*, or *ashes*, within the meaning of this act, except what the owners choose to treat as such?] If the defendants can remove this from their brewery in one parish to their cooperage in another, what is to prevent them from removing it from their house in *London* to their garden in the country? If this power here contended for is conceded to the defendants, then a party having two residences can always cheat the

scavenger of the district where the dirt is made. In *Ward v. Bird* (a), it was held that the proper mode for a scavenger to enforce his right under a statute like the present is by an action on the case.

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*Sir William Follett, contra*, was stopped by the Court.

**PARKER, B.**—It appears to me clear, that if you look at the context, you will be of opinion that the act only applies to what, in the contemplation of the owners, is treated as rubbish. If there be any other purpose for which the owner can use them, either on the same premises or elsewhere, he may do so. The right of the scavenger only attaches when the owner can use them in no other character than as rubbish. If, however, they are convertible into fuel, the owner cannot be said to have abandoned his property in them, so as to give the scavenger a right to claim them.

**BOLLAND and GURNEY, Bs.**, concurred.

Judgment for the defendants.

(a) 2 Chit. Rep. 582.

# ATTORNEY-GENERAL v. KENIFECK.

**INFORMATION** by the Attorney-General against the defendant, founded on the 6 Geo. 4, c. 108, s. 45, for assisting and being otherwise concerned in the unshipping of foreign tobacco, the said tobacco then and there being goods liable to the payment of duties, the said duties not having been paid and secured. *Plea*—Not Guilty.

At the trial, before Lord *Abinger*, C. B., it appeared, that by an arrangement between the defendant, who resident in *England*, and a person of the name of *Morlan*, the defendant, in *May*, 1832, hired a vessel called the *Lavinia* at *Goole*, in *Yorkshire*. It was settled that the vessel was first to proceed to *Newcastle*, and thence to sea, for the purpose of taking on board a cargo of contraband tobacco in *Flushing* roads. On the 27th of *July*, 1833, the vessel, with the tobacco on board, arrived in the cove of *Cork*. The defendant, after hiring the vessel, resided in *Ireland* up to the time the goods were run; but there was no evidence to shew that he was further connected with the smuggling in question than by hiring the vessel. The present information was filed on the 19th of *July*, 1836. At the trial, it was objected for the defendant, first, that the venue was improperly laid in *England* instead of in *Ireland*, where the offence of unshipping was complete; and, secondly, that the limitation of three years given by the statute 6 Geo. 4, c. 108, s. 77, exempted the defendant from liability, as his connection with the transaction was complete and ended more than that period before the filing of the information. The lord chief baron reserved the points. The defendant was found guilty; and *Jervis*, in last term, obtained a rule to set aside the verdict.

The defendant, in the year 1832, hired a vessel in *England* for the purpose of smuggling tobacco into *Ireland*. The cargo was taken on board before the 19th of *July*, 1833, and was unshipped at *Cork* on the 28th of *July* in that year. The information was filed on the 19th of *July*, 1836. Held, that, as the unshipping was the offence contemplated in the act, which offence took place in *Ireland*, the defendant could not be proceeded against in *England* under the 6 G. 4, c. 108, as a party guilty of assisting or being otherwise concerned in the unshipping of goods.

The *Solicitor-General*, *Tancred*, and *Kaye*, now shewed cause.—This information charges the defendant with “being concerned in the unshipping;” and in order to bring him within this provision of the statute, it is only neces-

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sary to shew the hiring of the vessel by the defendant; because, at the very moment when the unshipping took place, the offence contemplated by the statute was complete. Of this complete act the hiring of the vessel was a material and important part. The object of the hiring was clearly with a view to the smuggling expedition, which ended on the unshipping of the cargo in *Ireland*; and therefore the defendant was "concerned" in it. Besides, the words of the statute, "otherwise concerned," do not render an actual presence at the time of the unshipping necessary. *Attorney-General v. Tomsett* (a). Then as to the venue. This is a transitory offence, as in *Attorney-General v. Roger Hines* (b); or, if it be a statutable misdemeanor, then a party may be tried wherever he completed any part of the offence. In fact, the present falls precisely within the principle of the case of *Rex v. Burdett* (c), more especially as propounded in the judgment of *Holroyd, J.*, who there says (d), "Writing a libel with the intent and for the purpose of its being published, (under circumstances not sufficient to justify or excuse the writer for so doing,) followed by a publication by the act or under the authority of the writer, is, in my opinion, by the law of *England*, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county." So in *Rex v. Briscoe and another* (e), *Grose, J.*, says, "The conspiracy as against all having been proved from the community of criminal purpose, and by their joint co-operation in furthering the objects of it in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them in prosecution of the conspiracy in the county where the trial was had;" citing *Rex v. Bowers and others*. So also in *Bulwer's case* (f), as to local actions. Moreover it is expressly enacted by the 6 Geo. 4, c. 108, s. 78, "that any indictment or information which shall be found or prosecuted for any offence against this or any other act relating to the revenue of customs, shall and may be inquired of, examined, tried, and determined in any county of *England*."

Lastly. Supposing the venue to be correctly laid, the information is in time, as the computation must take place from the time when the unshipping took place, which was clearly within three years.

*Jervis, contrâ*, was stopped by the Court.

LORD ABINGER, C. B.—This is an information against the defendant for being concerned in the unshipping of tobacco in *England*, and it is quite clear that the unshipping took place in *Ireland*. There was no proof given that the defendant had any participation in the actual unshipment; and the act of hiring the ship could not be construed to be such participation. It might have happened, for instance, that the goods contemplated by him had never been unshipped, or that, before the unshipping took place, he might have given notice of abandoning the transaction. The act of the defendant in this county was no part of the unshipping; it is merely evidence of it. In the case of *Sir Francis Burdett*, the offence cognizable by law was the publication; and therefore it was held, that a delivery in *Leicestershire*, with a view to a publication in *London*, completed the offence in *Leicestershire*. Here the act positively

(a) 2 C., M., & R. 170.  
 (b) Parker's Rep. 182.  
 (c) 4 B. & Ald. 95.

(d) P. 135.  
 (e) 4 East, 164.  
 (f) 7 Coke, 1.

states the offence to be the unshipping; and as each country has its separate jurisdiction, we clearly cannot have cognizance of an offence which took place in *Ireland*.

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BOLLAND, B.—I am of the same opinion. The case in *Parker's Reports* was merely as to the power of the king to lay an information in one county, the offence having arisen in another. The question here is, whether the defendant was concerned so as to make him liable in *England*, and I think not. The words of the act are, "assist or be otherwise concerned in unshipping." "Assisting," I think, means manually assisting; and being "concerned," I take to be some such participation as providing a warehouse, or otherwise meddling with the goods. It is plain that in neither respect was the defendant concerned; as, with respect to this charge, he did not reside in *Ireland* at the time; and his hiring the vessel is no part of the offence.

ALDERSON, B.—The question is, what was the offence? It is clear, that if any part of the offence took place here, the defendant would be triable in this country. The judges, in *Rex v. Burdett*, all agree in going on the supposition that writing is part of the offence. Here the offence is being concerned in the unshipping, and the whole of that took place in *Ireland*. All that the defendant did in *England* is merely evidence of a participation in the offence that was committed in *Ireland*.

GURNEY, B., concurred.

Rule absolute.

### BRIND v. DALE.

**A**SSUMPSIT. The declaration stated that the defendant, before and at the time of the making of his promise thereafter next mentioned, was a common carrier of goods and chattels in and by a certain cart, from divers places to divers other places; and thereupon the plaintiff theretofore, to wit, on the 14th day of *November*, 1836, at the request of the defendant, caused to be delivered to the defendant as such carrier certain goods and chattels therein set out, to be taken care of and safely and securely carried and conveyed by the defendant as such carrier aforesaid, in and by the said cart, from a certain place, to wit, a place called *Nicholson's Wharf*, to a certain other place, to wit, a place called *Brook's Wharf*, and there, to wit, at *Brook's Wharf* aforesaid, to be safely and securely delivered by the defendant for the plaintiff.

The declaration then contained a promise of the defendant safely to carry, convey, and deliver the trunk, &c.; and that he did not safely carry, &c.; and that the trunk was lost, &c.

There were several pleas; the 5th only, however, was material, and was as follows:—

And for a further plea on this behalf, the said defendant says, that at the said time when he the said defendant received the said supposed goods and chattels from the said plaintiff, and at the time the said supposed promise of the said defendant in the declaration mentioned was made, a certain express condition and agreement was then made and entered into between the said plaintiff and the said defendant, that is to say, that whilst the said defendant carried and

To a declaration in assumpsit against the defendant as a common carrier, on a contract to carry goods from N. to B., and safely to deliver them, with an averment that he did not deliver them, but that by his negligence they were lost, the defendant, in addition to non-assumpsit, pleaded an agreement between him and the plaintiff that the plaintiff should accompany him to guard the goods from N. to B.; *Held* bad, on special demurrer, as amounting to the general issue.

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conveyed the said trunk with the said goods and chattels in and by the said cart, from the said place called *Nicholson's Wharf* in the said declaration mentioned, to the said place called *Brook's Wharf*, in the said declaration mentioned, he the said plaintiff would accompany and follow the said cart of the said defendant, from the said place called *Nicholson's Wharf*, in the said declaration mentioned, to the said place called *Brook's Wharf*, in the said declaration mentioned, and watch and protect the said goods and chattels from being stolen or lost out of the said cart; and the said defendant further saith, that whilst the said defendant so carried and conveyed the said goods and chattels from the said place called *Nicholson's Wharf*, to the said place called *Brook's Wharf*, he the said plaintiff, contrary to the said condition and agreement in that behalf, wholly neglected and refused so to accompany and follow the said cart, or to watch and protect the said supposed goods and chattels from being lost or stolen from the said cart, by reason whereof, and not by any negligence, carelessness, or improper conduct in the said defendant or his servants, the said goods and chattels became and were lost. And this the said defendant is ready to verify.

*Special demurrer*, assigning for cause, that the said plea does not properly confess the promise in the declaration. Secondly, that the matter of defence in the said plea, amounts to the plea of non assumpsit, and ought to have been so pleaded. Thirdly, that the plea is bad in substance, inasmuch as the engagement entered into by the plaintiff, without consideration, could not limit the defendant's liability as a common carrier.

*Bartsow*, in support of the demurrer.—The plea is bad, either as amounting to the general issue; or, if not, it is then no answer to the action. The contract, as stated in the plea, is altogether different from that stated in the declaration. (He was then stopped by the Court.)

*W. H. Watson*, in support of the plea.—The fifth plea shews an independent and collateral contract. It was the duty of the plaintiff, under this agreement, to watch the goods; and, in order to avoid circuitry of action, it was proper that it should be set forth in the plea. [*Parke, B.*—It is nothing more than a contract to protect the carrier in case of loss or theft.] If the Court be of opinion that it is only a qualification of the contract, the plea is indefensible.

*Per Curiam*.—Judgment for plaintiff.

### GOUGH v. BRYAN.

In an action on the case for negligent driving, the defendant pleaded that the plaintiff by his servants so negligently

THIS was an action on the case, for the negligent driving of a stage-coach, whereby the said coach ran and struck with great force and violence upon and against the carriage of the plaintiff, wherein the sons of the plaintiff were driving and riding.

*Pleas*—1st, not guilty. Secondly, that the carriage of the plaintiff was

drove his carriage that it struck against the coach of the defendant, without this, that the coach of the defendant struck against the carriage of the plaintiff, through the carelessness of the defendant. Held bad on demurrer as amounting to the general issue.

under the guidance of a son of the said plaintiff, who was driving the same along the said highway; and that the servant of the defendant was carefully, &c., guiding and driving the said coach of the defendant, along the said highway; and that if the said son of the plaintiff had driven skilfully, no collision would have taken place; but that the said son of the plaintiff drove in so unskillful a manner, that the carriage of the plaintiff, at the said time, when, &c., ran against the coach of the said defendant, and by means thereof the damage in the declaration alleged, occurred; *without this*, that the defendant, by his said servant, so carelessly and improperly drove, that, through and by his carelessness and improper conduct the coach of the defendant then ran and struck, &c.

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*Special demurrer*, on the ground that the plea amounted to general issue.

*Kelly*, in support of the plea.—Since the new rules there is no general issue properly so called; the former general issue was more extensive than the present plea of not guilty. Formerly, not guilty, denied the whole material allegations; for instance, a release or payment might have been given in evidence under the general issue; still they might have been pleaded, and could not have been objected to as amounting to the general issue. [Lord *Abinger*, C. B.—In an action on the case it appears to me that the general issue amounts to a denial of the wrongful act. If there had been equal negligence at both sides, that might have been pleaded; this, however, as shewn in the plea, is nothing more than a mere denial of the wrongful act.] I take the law to be this; that if an accident is proved to have been occasioned in part by the negligence of the plaintiff, and in part by that of the defendant, there is a complete answer to the action, and a verdict must pass for the defendant. If, indeed, the declaration had contained an averment that the injury had arisen “only” from the negligence of the defendant, then not guilty would have been a sufficient denial; but the declaration, as framed at present, omits any statement that the injury resulted “merely” from the misconduct of the defendant; it is, therefore, questionable whether evidence would be receivable under the plea of not guilty, to shew that the act was occasioned partly by the plaintiff’s own fault. On this ground, therefore, the plea is proper.

Lord *ABINGER*, C. B.—I am of opinion that this plea is bad. The principal reason why a plea is held bad, as amounting to the general issue, is, that it contains unnecessary and superfluous matter. As this plea concludes to the country, the above may be urged as the principal reason against it. If it had concluded with a verification, it would have been still more improper, and for this reason, viz., that its numerous allegations would have perplexed the plaintiff in selecting what he ought to traverse. I cannot agree to the statement that the new rules have abolished the old general issue. They have only narrowed and circumscribed its operation as far as affects the evidence which is admissible under it; but where applicable, it is still subject to the rules which formerly governed it.

*BOLLAND*, B., concurred.

*ALDERSON*, B.—In *Comyn’s Digest*(a), it is laid down, “when a man has

(a) Pleader, E. 13.



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no special matter for his justification or excuse, he ought to plead the general issue to avoid prolixity in records." That rule governs the present case.

GURNEY, B. concurred.

Judgment for the plaintiff.

*R. Gurney*, who was to have supported the demurrer, was stopped by the Court.

### NICHOLL v. WILLIAMS.

In assumpsit for use and occupation the amount claimed in the declaration was 105*l.* The plaintiff's particulars were for 52*l.* 10*s.* being the balance of one year's rent at 105*l.* per annum. The defendant pleaded as to all but 52*l.* 10*s.* non-assumpsit; and as to 52*l.* 10*s.* payment. Issue was joined on non-assumpsit; and a *nolle prosequi* entered as to the plea of payment. The defendant not having used the plaintiff's particulars at the trial in order to restrict him in his proof, *Held*, that although the defendant proved payment of all the rent, the plaintiff was entitled to a verdict with nominal damages.

**ASSUMPSIT.** The declaration stated that the defendant was indebted to the plaintiff in the sum of 105*l.* for use and occupation of a certain messuage of the plaintiff, and in 200*l.* for money due on an account stated.

*Pleas.*—1st. Except as to 52*l.* 10*s.* parcel, &c., non-assumpsit; 2ndly. As to 52*l.* 10*s.* parcel, &c., payment before action.

*Replication*, taking issue on the first plea; *nolle prosequi* as to the second.

The plaintiff's particulars were as follows:—The plaintiff seeks to recover in this action 52*l.* 10*s.* being the balance of a year's rent due from the defendant to the plaintiff for the occupation of a farm and premises, situate at *Boverton*, &c., and which the defendant quitted on or about the 2nd *February*, 1833.

At the trial, before *Coleridge, J.*, at the last assizes for *Glamorganshire*, the plaintiff proved the occupation of the farm by the defendant for several years, at a rent of 105*l.*, payable half-yearly, and the defendant in answer put in receipts for rent to shew that he had paid all arrears. It was objected by the counsel for the plaintiff, that, insomuch as the plea of payment was only to part of the demand, the evidence of payment was only admissible in reduction of damages. A verdict, however, was found for the defendant, the learned judge reserving leave to the plaintiff to move to enter a verdict, with nominal damages.

*E. V. Williams* having moved accordingly,

*Chilton* shewed cause.—It is admitted that the action is brought to recover the last half year's rent, and no more. The declaration, together with the particulars, shews that the real demand is for 52*l.* 10*s.* This amount is covered by the plea of payment, and the payment being admitted, the defendant is entitled to a verdict. [*Parke, B.*—The real question is whether, under these particulars, if 52*l.* 10*s.* had not been paid, the plaintiff could have recovered any thing.] The real effect of the particulars is to strike off 52*l.* 10*s.* from the demand in the declaration. The old doctrine is, that the defendant is equally entitled to take advantage of an admission on the particulars as on the record, and the plaintiff cannot in his proof go beyond the amount claimed in his particulars. *Colson v. Selby*(a), *M'Carthy v. Smith*(b).

(a) 1 Espin. 452.

(b) 8 Bing. 145.

[*Parke, B.*—The question comes at last to a question of the construction of particulars.] In *Coates v. Stevens* (c), it was held, that it was unnecessary to plead the payment of a sum admitted by the particulars. *Ernest v. Brown* (d), will be relied upon on the other side; the Court of Common Pleas, however, did not impeach the ruling of this Court; for they took the distinction that *Ernest v. Brown* was an action of debt, and *Coates v. Stevens*, assumpsit. (He also cited *Holland v. Hopkins* (e), and *Brown v. Watts* (f). The Court then called on the other side.)

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*R. V. Williams and Nichol, contrà.*—The defendant no doubt shewed a strong case evidencing payment of all that was due. Still it was not competent to the plaintiff, under non-assumpsit, to prove payment as an answer to the action; he could only make use of it in mitigation of damages. No allusion whatever was made at the trial to the particulars; the whole defence set up, was, that the rent had been fully paid by the defendant. If the plaintiff is to be restricted by the particulars, then, according to the defendant's argument, whatever proof the plaintiff could give of more than 52*l.* 10*s.* being due, he would be precluded from going into it. The plaintiff says, the payment applies only to the 52*l.* 10*s.*, for which credit has been given in the particulars; the defendant, on the contrary, insists that it applies to that part to which a *nolle prosequi* has been entered. Suppose an action brought to recover a sum of 100*l.* for goods sold and delivered, and particulars giving credit for payment to the amount of 50*l.*; the fact being that goods to the amount of 50*l.* had been sold to the defendant and paid for by him; but there being a doubt as to whether, as regarded the remaining 50*l.*, the goods had been delivered to an authorized agent of the defendant; the defendant pleads as to 50*l.* payment, and as to the residue, non-assumpsit; and the plaintiff then enters a *nolle prosequi*, as to the 50*l.*, payment of which is pleaded. What is a defendant's position in such a case? Would it be allowable for him to say—"Your particulars give me credit for 50*l.*; I have pleaded payment of 50*l.* more; you enter a *nolle prosequi* as to that sum, and therefore I owe you nothing!" The real meaning of the pleadings is, that the plea of payment applies to that for which credit is given in the particulars; and the non-assumpsit applies to the residue of the demand.—If *Ernest v. Brown* is law, it is beyond all doubt that the defendant was bound to plead to the credit admitted by us in the particulars. The distinction between assumpsit and debt is quite immaterial. Non-assumpsit and nunquam indebitatus, equally deny a state of facts upon which a liability arises; and if the particulars operate as an exclusion of the necessity of proof under the one, they ought equally to do so under the other. Great inconvenience would arise if the particulars are held capable of controverting the record; they are shifting and uncertain in their nature. [*Alderson, B.*—If the particulars are to control the record, they will control it to this extent, that although 100*l.* is claimed in the declaration, 50*l.* will be the sole demand.] If there be a demand of 100*l.*, with particulars giving credit for 50*l.* paid, with a balance of 50*l.* due, the defendant may adopt either of two courses: for instance, he may plead payment as to the whole, and prove payment of what is really due; or he may plead as to 50*l.* parcel, payment, as to the residue a set-off. If,

(c) 2 C. M. & R. 118.  
(d) 3 Bing. N. C. 494.

(e) 2 Bos. & Pul. 13.  
(f) 1 Taunt. 353.

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therefore, the defendant may treat the record in either of those two ways, the plaintiff ought to have the same option; there is, therefore, no necessity to resort to *Ernest v. Brown*. The defendant having it in his power to plead payment generally, has thought fit only to plead it as to 52*l.* 10*s.*, and by pleading non-assumpsit as to the residue, has misled the plaintiff into the supposition that he meant to deny some portion of the occupation. [*Parke, B.*—The plaintiff is wrong in not bringing his action merely for 52*l.* 10*s.*] That applies equally to every plaintiff who declares for more than the balance in his particulars. Then a new assignment would be improper in this case; it is only proper where the plea assumes to answer to the whole declaration. Bull. N. P. 17; 1 Saund. 299, a. n. (5); *Barnes v. Hunt* (g); *Hale v. Middleton* (h); *Atkinson v. Matteson* (i).

*Cur. adv. vult.*

The judgment of the Court was now delivered by

PARKE, B.—His lordship, after stating the facts of the case and the pleadings, then proceeded:—The question is, whether the rule for entering a verdict ought to be made absolute, and we are of opinion that it ought. The whole question turns upon the true construction of the particulars and pleadings in this case. These particulars must, under the circumstances, be taken to be the same as if they had been delivered subsequent to the declaration. These particulars, in substance, admit the payment of half a year's rent; and the question is, whether the plea of payment of 52*l.* 10*s.* refers to the sum so admitted, or to the balance which the plaintiff seeks to recover. If the defendant had understood, at the time of the trial, that it referred to the latter, he would naturally have instructed his counsel to insist, (which he did not do,) on restricting the plaintiff from going into any proof at all; for, in that view of the case, there would have been no question to try after the plaintiff had admitted payment. On the other hand, unless he had meant, at the time of pleading, to apply the plea of payment to the sum of 52*l.* 10*s.* in question, he would have pleaded improperly with a view to his intended defence. We have a difficulty in saying what the defendant intended, but we must construe the plea as we think it would have been understood by the plaintiff or any other person. Now as it was optional for the defendant to use the particulars or not, on the trial, to restrain the plaintiff, the plaintiff could not tell whether they would be so used; and, finding the plea of payment of 52*l.* 10*s.* to a part of the demand, and knowing that such amount had been paid, he could not safely have taken any other course than to admit payment; he could not have acted upon the plea as having any other meaning than a plea of part payment of the demand. In that sense we think the plea must be understood. And, if the recent decision of the Common Pleas, in *Ernest v. Brown*, be right, that the defendant could not have availed himself of the part payment, admitted in particulars, by restraining the plaintiff in point of evidence, and must have pleaded part payment, there can be no question as to the meaning of the plea. We do not, however, feel it necessary to decide whether the defendant was bound to plead payment after such a particular as this, or not; for, we think, without relying on that case, we must construe the plea as intended to apply to the payment admitted. To avoid similar questions in future, the obvious course which ought to be pursued in the like cases, is

(g) 11 East, 451.

(h) 4 Ado. & Ell. 107.

(i) 2 Term Rep. 176.

for the plaintiff to adopt the mode of declaring which we have been informed is not infrequent, to aver the part payment in the declaration, or to insert in the declaration the real amount which the plaintiff seeks to recover.

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Rule absolute.

### IN re PERING.

**MR. RICHARD PERING** had presented a petition of right, addressed "To the king's most excellent majesty in his Court of Exchequer," praying for compensation for services rendered in his majesty's dock-yards. He had incurred considerable expense in furthering the improvement of anchors, and other matters connected with the public service, and had in consequence applied for compensation; but this he had not succeeded in obtaining. In consequence the present petition was presented by him to his majesty, praying that his majesty would order right to be done in the matter, and to indorse an order on the petition to that effect; and also that his majesty would be pleased to refer the petition, so indorsed, to the barons of his Majesty's Exchequer. The king's indorsement was as follows: "Let right be done." Subscribed to the petition was a memorandum, signed by the home secretary, stating that his majesty was pleased to refer the petition to the attorney-general to take the necessary steps thereon.

The *Attorney-General*, for the crown.—This is a petition of right, praying that his majesty's attorney-general do shew cause why he should not admit the truth of the statements therein contained; and if not, why an inquisition should not issue to inquire into the same, and why the said attorney-general should not appear in Court to answer the matters in the said petition. It is submitted that this Court has no jurisdiction in the present case; and that at no time could a petition of right, framed like the present, succeed; in point of fact, the petition of right, in consequence of the indorsements upon it, is nugatory, and its effect, as a petition of right, is altogether taken away, and for this reason:—the indorsement expressly refers the petition to the attorney-general, to confess or deny the truth of the facts stated in the petition.—[*Alderson*, B. In *Comyn's Dig.*, tit. *Prerog.*, D. 80, it is said—"Upon petition out of Parliament, or there (if it be not pursued as a statute,) it shall be indorsed by the king, *soit droit fait*, and then delivered to the chancellor; or a petition may have a special conclusion, that the king command his justices of B. R. or C. B. And if it be indorsed accordingly, it shall be pursued there. Here there is no such special conclusion; the indorsement is merely "*Soit droit fait*."] In Lord *Somers's* celebrated argument in the *Bankers' case* (a), he goes at great length into the course of proceeding in a petition of right, and coincides with the law as laid down in the passage cited from *Comyn's Digest*. The petition here is—that his majesty will do two things: first "that he will order right to be done," which request has been complied with; secondly, "that he will refer the petition to the barons of this court;" the latter part has not been acceded to, and the reference to the attorney-general shews that it was not intended to give this Court jurisdiction.

A petition of right was addressed "to the king in his Court of Exchequer," and prayed that he would order "right to be done," and that he would indorse the petition to that effect; it also prayed, that the king would refer the petition to the "Barons of the Exchequer;" the king indorsed the petition "*soit droit fait*." *Held*, that this Court had no power to adjudicate upon the petition.

(a) How. State Trials, vol. 14, p. 59.

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*W. H. Watson, contrà.*—It will be conceded that a petition of right will lie to any Court in *Westminster Hall*. [Lord *Abinger*, C. B.—No doubt the king may refer it to any court by his indorsement.] This is a petition to his majesty in his Court of Exchequer. [Lord *Abinger*, C. B.—Is there any precedent of such a petition? The mere presenting of the petition to the king in his Court of Exchequer, is not sufficient to give us jurisdiction.] There is a prayer in the petition that his majesty will cause “right to be done,” and will “refer the matter to the barons of the Exchequer;” the indorsement of the king is equivalent to saying “Let right be done in the manner prayed, viz. in the Court of Exchequer. [Alderson, B.—“*Soit droit fait*,” without more, refers it to the Court of Chancery; it would be different if it were “*Soit droit fait* in the Exchequer.”] The distinction is between a general and special petition. [Alderson, B.—If that be so in this case, and the petition must be taken to be special, there is a definite answer referring the matter to the attorney-general.] In Sir *H. Nevile’s* case (*b*) this Court entertained a similar petition. [Alderson, B. That was a petition to the Court of Exchequer, and not to the king.] Yes; but the note of the reporter in that case is as follows:—“From this record may be seen the order and form how one who has a rent out of land in the king’s hands, shall make his petition to the Court of Exchequer to come at it, without making petition to the king’s person; and also how he shall have judgment executed; for it is not the course to command by parol that payment be made, but a writ in the form aforesaid shall be awarded by the barons.” [Lord *Abinger*, C. B.—The present is a petition to the king in person, and not to the barons of the Exchequer. In *Worth’s* case (*c*), which was a petition to be paid the arrears of an annuity granted to the petitioner by King *Henry* the 8th, this Court entertained the petition. [Bolland, B. That was not a petition of right.] In *Manning’s Exchequer Practice* (*d*), as to proceedings at the revenue side of the court, it is stated—“Where a right is sought to be established against the crown itself, the course prescribed by the common law is, to address a petition to the king in one of his courts of record, praying that the conflicting claims of the crown and the petitioner may be duly examined. As the prayer of this petition is grantable *ex debito justitiæ*, it is called a petition of right, and is in the nature of an action against the king, or of a writ of right for the party, though chattels, real or personal, debts, or unliquidated damages, may be recovered under it.” In *Viner’s Abridgment*, tit. *Prerog. of the King*, Q. 13, it is said—“The justices of B. R. may proceed to the examination of the matter by themselves, if the petition contains that the king commands them to examine it, and this without original out of Chancery.” Here is a special petition to the king, embodying the mode in which the petitioner requests that right may be done; and consequently the indorsement “*Soit droit fait*,” is equivalent to saying—“Let right be done in the manner prayed;” that is, before the barons of the Exchequer.

Lord *ABINGER*, C. B.—If a single precedent had been cited to shew, that, inasmuch as the petitioners prayed that right might be done in the Court of Exchequer, the indorsement “*Soit droit fait*” was sufficient to give this Court jurisdiction, I should have assented to the argument. No such precedent, however, has been produced; and notwithstanding the numerous cases of this

(*b*) Plow. 377.

(*c*) Ibid. 452.

(*d*) Page 84.

description which must have occurred, no authority is shewn to warrant us in proceeding to adjudicate upon this petition. All that is shewn to us here is an indorsement, "Let right be done." If, indeed, the indorsement had been special—"Let right be done in the Court of Exchequer," we should have been empowered to decide upon the matter; in the absence of such indorsement we cannot interfere.

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BOLLAND, B., concurred.

ALDERSON, B.—In Comyn's Dig. Prerog. D. 80, it is said, "a petition may have a special conclusion, that the king commands his justices of B. R. or C. B.; and if it be indorsed accordingly, it shall be pursued there." "Accordingly" there means, in accordance with the special prayer of the petition, we have no such indorsement in this case, and therefore cannot interfere.

### GILLET v. ROXBURGH.

**A**SSUMPSIT on a bill of exchange, by the indorsee against the indorser, together with counts for money had and received, and on an account stated. The count on the bill of exchange, followed verbatim the form given by the rule of *Trinity* Term, 1 William 4, the promise to pay in the declaration was confined to the said several last-mentioned monies respectively," omitting any promise in respect of the bill. The defendant pleaded, to the first count, that he had no notice of the dishonour; and to the money counts, non-assumpsit. At the trial, before *Gurney*, B., a verdict having passed for the plaintiff;

In a count on a bill or note, it is not necessary to allege a promise to pay.  
At least, the omission cannot be matter of objection, except on special demurrer.

*Mansel* subsequently obtained a rule *nisi* to arrest the judgment, on the ground that the count on the bill ought to have stated a promise to pay.

*Fisk* now shewed cause.—The first question is, whether an omission formally to state a promise to pay is bad in substance, or only upon special demurrer. Where the declaration discloses facts from which the law will imply a promise to pay, it is unnecessary to aver it specifically; this is laid down in 1 Chit. Plead. 299. *Starkey v. Cheesman* (a), *Mountford and another v. Horton* (b), *Corbet v. Packington* (c). In *Starkey v. Cheesman*, plaintiff declared on a bill of exchange against the drawer, shewing that the party on whom it was drawn refused to pay it, *per quod onerabilis, devenit*, &c., but laid no express promise. After judgment by default, and a writ of inquiry executed, the defendant moved in arrest of judgment, on the ground of the omission of the promise; but *Holt*, C. J., held, that the drawing of the bill was an actual promise, and judgment was given for the plaintiff. The same point was ruled in *Wegerslope v. Keene* (d). In *Lee v. Welch* (e) which was an action for goods sold and delivered, omitting to state a promise to pay, the declaration was held bad. But the case of goods sold and delivered differs from that of a bill of exchange, in this, that the law does not necessarily imply a pro-

(a) 1 Salk. 128.

(b) 2 N. R. 62.

(c) 6 B. & C. 268.

(d) 1 Strange, 214.

(e) 2 Strange, 793.

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mise, as the sale may be clogged by certain conditions, which might exonerate the defendant from liability. So also in case the Statute of Limitations had run against the demand. In this case the declaration states the drawing, indorsing, presentment, non-payment, and notice of dishonour. It never was heard that a plaintiff in an action as indorsee against an indorser, was called upon to prove an express promise by the defendant. [*Alderson*, B.—Neither do you ever hear of a promise called for where goods are sold and delivered.] In an action of goods sold and delivered, the jury are the parties to infer the promise. Lord *Holt* says, in *Starkey v. Cheeseman*, that the drawing of the bill is an actual promise. In *Wegerslope v. Keene*, Mr. Justice *Fortescue* (g) refers to a case of *Lowther v. Conyers* upon a promissory note, when *super se assumpsit* was omitted, which was held sufficient, because the law raises a promise. [*Alderson*, B.—A promissory note as set out in the declaration shews an express promise.] In *Bayley on Bills*, p. 408, referring to the cases of *Wegerslope v. Keene* and *Starkey v. Cheeseman*, it is said “this clause (viz. a promise) is unnecessary in an action against either the acceptor of a bill or the maker of a note; and it may be doubted whether it is essential in any other.” It is apprehended that the indorsement of a bill is as much a promise as the acceptance or the making of a note; the only difference is that, in the latter two cases, the promise to pay is in the first instance.

Even supposing, however, this omission would be bad on special demurrer, still it is after verdict, and so cured. In the case of *Stennel v. Hogg* (h), in the note, the rule is thus stated:—“With respect to imperfections which are cured by verdict at common law, it is to be observed, that when there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; yet, if the issue found be such as necessarily required, on the trial, proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law.” [*Alderson*, B.—The only issue here is as to the notice of dishonour. If it had been a question on the old plea of non-assumpsit, your argument would have been stronger. There was no necessity here to prove the promise at nisi prius, as the only issue is the notice of dishonour. The principle upon which an omission is cured after verdict is, that it is necessary to be proved at the trial. Suppose this declaration had omitted an averment of presentment, would that have been cured by the verdict?] Here the promise is a necessary implication from the facts stated, and in point of law is equivalent to a part of the proof. This is laid down by *Buller*, J., in *Spencer v. Parker* (i), and by *Grose*, J., in *Mac Murdo v. Smith* (k). *Starkie v. Cheeseman* was after judgment by default; the present case is much stronger, being after verdict. *Collins v. Gibbs* (l). The present rule was obtained on the authority of *Henry v. Burbidge* (m), which was an objection on special demurrer; and the chief justice, in giving judgment, distinguishes it from *Starkey v. Cheeseman*.

*Mansell*, contrà.—The invariable practice has been to allege a promise. The

(g) 1 Strange, 224.  
 (h) 1 Wms Saund. 227.  
 (i) 1 T. R. 145.

(k) 7 T. R. 523.  
 (l) 2 Burr. 899.  
 (m) 3 B. & C. 501.

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form given, by the judges themselves, in the new rules, shews, that it was their opinion that such a promise must in all cases be contained in the count, and this, too, as against the acceptor and maker. The liability of the acceptor of a bill and the maker of a note, has always been according to the "tenor and effect" of the respective instruments. But in other cases of secondary liability, the statement was that the party became liable to pay on request, "according to the usage and custom of merchants," and, being so liable, promised to pay. The meaning of *aider by verdict* is, that the verdict does not cure an imperfect title; but only a good title imperfectly stated. The only issue in the present case, was upon the want of notice. Before the new rules, the proper form of plea would have been *non-assumpsit*; that tends to shew that the promise is a necessary ingredient in the count. The promise is also shewn to be still necessary by the terms of the general replication *de injurid* in *assumpsit*, viz., "that the defendant broke his promise," without the cause alleged. The defendant is not sued merely on his liability, but on his promise. In the case of *Mountford v. Horton* there was a specific agreement to pay, and the Court there decided only that the agreement imported a promise. In *Starkey v. Cheeseman*, the declaration was "upon the usage and custom of merchants," which of itself implies a promise. *Lea v. Welch* is precisely similar to the present case. [*Alderson, B.*—Is it not strange that a declaration should be bad for omitting to aver a promise, while an act of parliament says a promise shall not be denied? It must be competent for a defendant to deny every material fact which it is necessary for the plaintiff to state. The law, having taken away *non-assumpsit* as a plea in actions on bills of exchange, shews that the promise is not material.] It is not because the judges said that it was not necessary to deny the promise, that therefore the promise can be dispensed with.

BOLLAND, B.—It appears to the Court that there is no weight in this objection. *Starkey v. Cheeseman* has decided the point. The attempt made to distinguish that case from the present, inasmuch as it contains an averment that the liability was according to the usage and custom of merchants, is not successful. In *Bayley on Bills*, p. 382, it is laid down, that the custom of merchants need not be set out in the count, as the Court will take notice of it.

ALDERSON, B.—I am of the same opinion. I do not think it necessary to aver a promise, as, since the new rules, it is not allowable to plead *non-assumpsit*. The question under the old rule might have been different. The defendant is now obliged to deny "some matter of fact;" and, therefore, if the entire facts of the declaration are proved, the promise to pay is implied. It may possibly be an objection on special demurrer, as in *Henry v. Burbidge*; but I do not think it a valid objection, as in the present case, after verdict.

GURNEY, B., concurred.

Rule discharged.



## YOUNG v. GROVE.

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The Vauxhall Bridge Act, 49 Geo. 3, c. 142, does not exempt occupiers of premises in the Vauxhall Road, but within the limits of the Tothill Fields' Act, 6 Geo. 4, c. 134, from contributing to the paying-rate assessed under the latter act.

THIS was an action of trespass brought to recover damages for a distress levied by the defendant, under the authority of the trustees of *Tothill Fields*, upon the goods and chattels of the plaintiff, in respect of his dwelling house and premises, described in the rate-book of the trustees as in the *Vauxhall Road*, and being situate in the parish of *Saint John the Evangelist, Westminster*; and under which the plaintiff paid the sum of 6*l.* 10*s.* 6*d.* The defendant pleaded the general issue, and thereupon issue was joined, and the parties afterwards consented, under a judge's order, to state the facts for the opinion of this Court, as follows:

The *Vauxhall Bridge Road* was made and formed under the provisions of the statute of 49 Geo. 3, c. 142, which is a public act, intituled "An Act for building a Bridge across the River *Thames*, from or near *Vauxhall* Turnpike in the Parish of *Saint Mary, Lambeth*, in the County of *Surrey*, to the opposite Shore in the Parish of *Saint John*, in the City and Liberties of *Westminster* and County of *Middlesex*, and for making convenient Roads thereto;" and enactments are contained in such act to the following effect: by section 46, it is enacted, that it should be lawful for the company of proprietors (of the said bridge,) to set out and make a new road, to pass from the foot of the said intended bridge in a line across the west of *Tothill Fields*, in the direction therein particularly described, to *Eaton Street*, opening a communication with *Pimlico* and *Grosvenor Place*, passing through the several parishes of *Saint John, Saint Margaret, and Saint George*, within the said city and liberty of *Westminster*, together with other roads when made, should afterwards be kept in repair by the said company of proprietors. Section 51 provides, that the said roads shall be completed within two years after the completion of the said intended bridge. By section 89 it is enacted, that the said company of proprietors or their committee shall and may erect and set up one or more gate or gates, turnpike or turnpikes, in, upon, and across the said intended bridge, and also a gate or turnpike in, upon, and across the said intended road leading from *Millbank* across the west of *Tothill Fields* aforesaid, and that such tolls shall be demanded and taken thereat as therein particularly mentioned. Section 109, 110, 111, and 112, provide for the prevention and removal of obstructions and annoyances and encroachments on the said bridge and roads, and for infliction of penalties for nuisances, &c., thereon. Section 113 enacts, that it shall be lawful for the said company of proprietors, or their committee, and they are thereby empowered and required, from time to time, to cause such and so many lamp-irons or lamp-posts to be put or affixed in, upon, or along the sides of the said bridge, and in, upon, or along the sides of the said roads, or upon or against any wall or palisade of any house, messuage, or tenement fronting any or either of the said roads, as they shall think proper; and also to cause such number of lamps of such size and sorts to be provided and affixed or put upon such lamp-irons and lamp-posts as they shall think necessary for lighting the said bridge, and every part or any part thereof, the said road, and every or any part thereof. Section 114 provides for the watching and guarding the said bridge and roads by the said company of

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proprietors. Section 116 and 117, for the infliction of penalties on parties damaging the mile-stones, watch-houses, lamps, lamp-posts, &c. on the said bridge and roads. Section 120 provides that the bridge shall be considered as half in the parish of *Saint John, Westminster*, and in the county of *Middlesex*, and half in the parish of *Saint Mary, Lambeth*, and in the county of *Surrey*; but that it shall not be deemed or taken to be a county bridge, so as to subject the said city or liberty of *Westminster*, or counties of *Middlesex* or *Surrey*, or any of the parishes or places therein before mentioned, or either of them, to the repairing of the same, or any of the roads therein directed to be made as aforesaid. By section 123 it is enacted, that the tolls to be collected and received under and by virtue of that act, shall be applied and disposed of, in the first place, in paying the expenses, for the time being, of carrying the act into execution, and of keeping the said bridge, roads, and access in repair, and of lighting and watching the same, and otherwise as therein particularly mentioned. Section 125 enacts, that if the said bridge, or the said road, lamps, watch-boxes, or other works, to be maintained and repaired by virtue of that act, or any part or parts thereof, shall become and be out of repair, or if the said bridge and roads, or any part or parts thereof, shall not continue to be watched or lighted in the manner thereinbefore directed, then the said company or their committee, or any five or more of them, shall cause the said bridge and roads, lamps, watch-boxes, and other works, to be repaired, or the said bridge or roads to be watched and lighted as thereinbefore directed, and in case of failure, within one week after notice to their clerk to that effect, then it shall be lawful for any person or persons to prefer or prosecute any bill or bills of indictment against the said company for such failure, who, if found guilty thereon, shall forfeit the sum of 20*l.* for every such failure, and be subjected and liable to commence such repairs as aforesaid, and to cause the said bridge and roads to be watched and lighted as thereinbefore directed, within ten days after such verdict; and in case of failure in the whole or any part thereof, the said company shall again become liable to such bill or bills of indictment and so *toties quoties* until the said repairs of the said bridge shall be completed, or the pavement thereof repaired or relaid, or the same to be watched and lighted as hereinbefore directed. Section 141 provides that the bridge should be completed within ten years from the passing of that act.

The road and footpaths from the bridge-foot and *Milbank* to *Eaton Street, Pimlico*, were completed according to the provisions of the said act and called "*The Vauxhall Bridge Road, or Vauxhall Road*;" and immediately after the formation thereof, the dean and chapter of *Westminster* let various portions of their lands, with frontages in the said road, for building on, and various houses and premises were shortly afterwards erected thereon, and, amongst others, the dwelling house of the plaintiff before mentioned, in or about the year 1817.

The premises in the plaintiff's occupation, of which he was a yearly tenant, and upon which the rate in question was made and levied by the trustees of *Totterdell Fields*, were and are the property of the dean and chapter of *Westminster*, and, in the month of *December*, 1817, were, with other premises, leased by them to *Alexander Copeland*, at an annual rent, who under-let the same for thirty-seven years, at an increased annual rent; and such premises consist of a dwelling-house, erected 1817, and of a stable, erected 1833, and of a garden-

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ground in the rear thereof, walled in the year 1833, and previously void ground. The house and stable abut upon, adjoin to, and communicate with *Vauxhall Bridge Road*, on the front thereof, and there are cellars under the footpath of such road; one end of the stable, and the wall of the said garden, abut upon, adjoin to, and communicate with *Wheeler Street*, which is repaired and cleansed by the trustees of the Tothill Fields' Act, but who have never pursued the means provided by the 54th section of the Metropolis Paving Act, hereinafter referred to, for the repair of imperfect paving, or for placing such street under their particular jurisdiction previous to rating the same.

[The case then set forth the following sections of the Metropolitan Paving Act, (57 Geo 3, c. 29,) ss. 1, 2, 6, 7, 24, & 54.] By the public act of parliament of 6 Geo. 4, c. 134, (*June 4, 1825*), intitled "An Act for Paving, Cleansing, Lighting, Watching, and Improving, the Streets and Public Places, which are or shall be made upon certain Grounds in the Parish of *Saint Margaret* and *Saint John the Evangelist, Westminster*, commonly called *Tothill Fields*," it is in the preamble stated, that the dean and chapter of *Westminster* are seized of and entitled to grounds in the parish of *Saint Margaret* and *Saint John the Evangelist* commonly called *Tothill Fields*; and that several streets, roads, ways, passages, and places had been made, laid out, and formed, and other streets, roads, ways, passages, and places were intended to be formed, on certain parts of the said grounds, and it would contribute to the benefit and security of the persons who should be inhabitants of the said streets and places, and of persons who shall have occasion to pass along the same, if proper provisions were made for paving, draining, and keeping in repair the said streets and places, and for cleansing, watering, lighting, and watching the same, and for preventing nuisances, annoyances, and encroachments therein; but as the same could not be effected without the aid and authority of parliament, it is enacted, that certain persons therein named shall be and they are thereby appointed trustees for carrying that act into execution, and shall be called "Trustees of *Tothill Fields*." By section 2, it is enacted that the jurisdiction, power, and authority of the trustees for carrying that act into execution, and all the regulations, enactments, and provisions therein contained, shall extend over and apply to all lands, grounds, houses, and buildings, and to all streets, roads, ways, passages, courts, or places whatsoever, already made, laid out, and formed, or hereafter to be made, laid out, and formed, *comprised within certain limits therein particularly described; and the line whereof twice crosses the Vauxhall Bridge Road, and the premises in question are within such limits.* By section 22, certain local acts affecting *Westminster*, therein particularly mentioned so far as the same in anywise relate to or concern the paving, repairing, cleansing, lighting, or watching the several streets and places within the limits or operation of that act, or any of them, or any part or parts thereof, or the removing or preventing nuisances, annoyances, and obstructions therein, and also every other act of parliament and enactment then in force, which in anywise relate to or concern the paving, repairing, cleansing, lighting, or watching the several streets and places within the limits or operation of that act, so far as the same in anywise relate to or concern the said several streets and places, or any of them, or any part thereof, other than and except the before-mentioned act of the 57 Geo. 4, c. 29, are repealed. By section 23, the trustees are authorised and empowered, from time to time, to form or cause to be

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formed the foot-ways and carriage-ways within the limits of the act, upon such levels and in such manner as they shall think proper; and also to cause, as well the foot-ways next the turnpike-roads, and other streets and roads not within the limits of the act, on the side of which the houses and buildings within the limits of the act are or shall be erected, as the foot-ways of all other streets, roads, and other public places, made and set out, or to be made and set out within the limits of the act, to be properly paved or made sound with gravel or other materials; and to cause the carriage-ways within the limits of the act to be paved, or the channels thereof paved, and the whole of the remainder thereof to be made sound with gravel or other materials, and to cause as well the foot-ways and carriage ways within the limits aforesaid already formed and paved and made good, as the foot-ways and carriage-ways to be formed or paved or made sound as aforesaid, to be from time to time amended and kept in good repair; and to make sewers and drains; and also to cause the said roads, streets, and public places, to be cleansed, watered, lighted, and watched in such manner as they shall think proper. By section 34 it is enacted, that all and every the enactments, provisions, powers, and authorities contained in the said act of 57 Geo. 3, c. 29, which relate to or concern the appointment of the surveyors of the pavement in the several parochial and other districts within the jurisdiction of that act, and for the speedy and effectual reparation of imperfect pavements in the streets and public places within the jurisdiction of that act, shall extend and apply to all foot-ways and carriage-ways whatsoever within the limits of the present act, whether paved in the ordinary manner, or formed of broken granite, flint stone, or any other material whatever, which shall be or ought to be paved, repaired, amended, or kept in repair by the said trustees; and that all other the enactments, provisions, powers, and authorities in such act contained shall also extend and apply to all the streets and places within the limits of this act, so and in such manner that the said trustees may from time to time, and at all times act under and upon all and every the enactments, provisions, powers and authorities in this act in the same manner as the commissioners, trustees, or other persons vested with the control or superintendence of the pavements of the streets or public places within the jurisdiction of such act, may act under and upon the same, but subject and without prejudice to the restrictions and limitations in this act contained, as to the amount of rates to be assessed and imposed within the limits and under the authority of this act. By section 72 it is enacted, that in order to raise money for carrying the several purposes of the act into execution, one or more rate or rates for the purpose of forming and paving, making drains and sewers in, repairing and keeping in repair, watering, lighting, cleansing, and watching the several roads, streets, and places within the limits of the act, and also for securing, and raising, and paying any monies which shall or may be borrowed, and any annuities which shall or may be granted under the authority of this act, and the interest of such monies, and also for answering and satisfying the other purposes of the act, shall be made, levied, and assessed by the said trustees, at yearly, half yearly, or quarterly periods, or oftener if they shall think necessary, upon all and every persons or person who shall inhabit, hold, use, occupy, possess, enjoy, or be entitled to, any chapel, meeting-house, market, or other public building, house, shop, coach-house, stable, cellar, vault, building, workshop, manufactory, garden-ground, land, tenement, or hereditament whatsoever, or any part or portion of any house,

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building, land, tenement, or hereditament, being a separate tenement, situate, lying, and being in any of the roads, streets, or places within the limits of this act, according to the yearly value thereof respectively. Section 78 provides, that if any house or premises shall appear to be partly within the limits of the jurisdiction of the trustees under this act, and partly in any street or place not within such limits, such house or premises shall be assessed for a proportionable part only of the rent thereof. By section 86, after stating that it has happened, and may happen, that houses and other buildings within the limits of the act have been or may be begun to be built, but not finished nor let, and it is reasonable that such houses and buildings should be rated and assessed for the purposes of the act, it is enacted, that until such houses and other buildings which are now or may hereafter be built or in building shall be finished and tenanted, (if the street or other place wherein such house or other building is or shall be situated shall be paved, repaired, cleansed, and lighted by virtue and in pursuance of the act,) it shall be lawful for the trustees to rate and assess all such houses and other buildings in manner therein mentioned. By section 87 it is enacted, that it shall be lawful for the trustees to rate and assess all and every burying place, dead walls, and void spaces of ground within the limits of the act, and which are not charged to such rate or assessment in respect of any messuage or other building whereunto they may be appurtenant at any rate not exceeding in any one year one shilling for every square yard of the foot and carriage-way, and other pavements contained in one half of the entire width of so much of every and any such street or public place as shall or may lay before, or at the sides or rear of, or about, upon, or adjoin to such burying places, dead walls, and void spaces of ground, or any part or portion thereof. By section 88 it is enacted, that it shall be lawful for the trustees to include in any rate or assessment, and thereby to rate or assess all houses, buildings, and ground abutting upon, adjoining to, and communicating with, any street, road, way, passage, court, or place, which shall be paved, repaired, cleansed, lighted, or watched, under the provisions of this act, although such house, building, or grounds may not be comprised within the limits in the act mentioned, except certain hospitals, houses, &c., therein mentioned. Section 120 provides that nothing in the act contained shall be deemed to affect or interfere with any of the powers, rights, or duties of the trustees of any turnpike roads within the limits of this act; and section 122 provides, that nothing therein contained shall operate or extend to place under the jurisdiction of the trustees for executing that act, all or any part of the highway or road called *The Vauxhall Bridge Road*, but the same and every part thereof shall remain, continue, and be subject to the powers and provisions of the said act of 48 Geo. 3.

The *Vauxhall Bridge Road*, to the extent of about one third of its whole length, is within the boundary line of the *Tothill Fields* district, and the other parts of the road are respectively within the parishes of *St. John the Evangelist*, *St. Margaret*, and *St. George, Hanover Square*; and in the latter parish a portion of the said road is within the limits of the Grosvenor Act of Parliament, 7 Geo. 4, c. 58.

No rate or assessment has ever been made by the commissioners, or other persons having the control of the pavements in the parish of *St. John the Evangelist* and *St. Margaret* and *St. George, Hanover Square*, upon any of the messuages, tenements, or hereditaments in the *Vauxhall Bridge Road* within

their respective parishes, except that the trustees of the Grosvenor Act rate the several inhabitants of such portion of the said road as is within the limits of their said act.

The *Vauxhall Bridge Road*, throughout its whole length, is repaired, cleansed, and drained, by the *Vauxhall Bridge* company of proprietors; and is also lighted by them, except such part thereof as is within the boundary line aforesaid, and along such parts certain lamps have been put up by the *Tothill Fields* trustees. But the *Vauxhall Bridge* Company have always repaired and cleansed, and do repair and cleanse, the footpath along the whole of the said road.

The trustees of *Tothill Fields* insist that the plaintiff is liable to the rates which, by the before-mentioned act, 6 Geo. 4, c. 134, they are authorized to make on all premises within the limits of their jurisdiction; and the plaintiff having refused payment of such rates, which are assessed on the full value of the whole of the said house, stable, and garden, and for the whole amount of the rate, the trustees, by their broker, the defendant, distrained for the same: while the plaintiff insists that his premises are in the *Vauxhall Bridge Road*, for the repairing, lighting, and cleansing and draining of which special provision is made by the first stated act, and that he is not liable to be so assessed to the *Tothill Fields* rates, and has therefore commenced this action on account of the distress levied on him. If he is not so liable, then a verdict is to be entered for the plaintiff for 6*l.* 10*s.* 6*d.*, but if he is liable, then a verdict is to be entered for the defendant.

Either party is to be at liberty to refer to any of the provisions of the statute hereinbefore mentioned.

The question for the opinion of the court is, whether the plaintiff was liable to be rated for the whole or *any* part, and what part, of the premises so occupied by him, by the trustees of the *Tothill Fields*' Act.

*Platt*, for the plaintiff.—The general rule as to the reparation of roads in front of houses is this, that each occupier shall repair that portion of the road which is immediately in front of the premises he occupies. If the building be a new one, then the party erecting it is bound to make the footway and the high road as far as the *medium filum*. Where there is no local act of parliament in any particular metropolitan district, then the General Metropolitan Act applies. Here, however, the occupiers in the *Vauxhall Bridge Road*, are relieved from the burden of reparation by means of the *Vauxhall Bridge* Act; they are liable, however, to pay their proportion of the tolls provided by that act. By the 54th section of the 57 Geo. 3, c. 29, (the General Metropolitan Act,) it is provided that the commissioners and trustees under that act, may inspect the roads and ways; and that they and the surveyor of pavements may (in the case of streets not repaired or paved under any local act,) give notice to the owners and occupiers to pave and repair in front of their own houses, and on their neglecting so to do, they are authorised to pave and repair at the expense of the parties making default. [Lord Abinger, C. B.—Is not the sole question whether the property of the plaintiff is within the limits of the *Tothill Fields*' Act?—It would be an extreme hardship for the inhabitants of *Vauxhall Road* to have the burden of repairing their own roads, and to be at the same time liable to contribute to the repairs of others in the district of *Tothill Fields*. An assessment upon an occupier, whereby he is ren-

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dered liable in one district, ought to exempt him from any further contribution. [Alderson, B.—The *Vauxhall Road* is repaired by means of the tolls; the inhabitants cannot be said, therefore, to be assessed to the paving rate for that road. If the *Vauxhall Bridge* Company should happen to become insolvent, then, as the act says that the *Vauxhall* Company only are to repair the road, no one would be liable.]—It is true that the burden of repairing is not imposed by means of a rate, still it is thrown upon the inhabitants by means of toll-bars. [Lord Abinger, C. B.—Only in common with the rest of the public. It is an advantage to the inhabitants, because, as long as the *Vauxhall Bridge* Company does the repairs, they can never be called upon. How does this affect their liability upon the land of the dean and chapter of *Westminster*? Alderson, B.—I presume that your argument is, that as the commissioners of the *Vauxhall Bridge* Company are bound to repair, you are exempted.] Precisely so. By the 86th section of the Tothill Fields' Act, the trustees are authorised to assess unfinished houses in streets paved, lighted, &c., under that act. If, then, the house next door to the plaintiffs were now in the process of building, the trustees could not levy a rate upon that house although equally within the limits, [Lord Abinger, C. B.—The house is saved by the exception in the clause, inasmuch as the only case in which they can assess unfinished houses, is where the street is paved and lighted by virtue of the Tothill Fields' Act; whereas the house in question is in a street paved and lighted under the *Vauxhall Road* Act. Alderson, B.—The question turns entirely on the second section of the Tothill Fields' Act, viz. whether the plaintiff's house is within the limits; there is no exception of the *Vauxhall Road*.]

LORD ABINGER, C. B.—I am of opinion that there is no doubt as to this case. This was a private act, introduced by the dean and chapter of *Westminster*, for the improvement of their own property. The plaintiff takes advantage of the *Vauxhall Bridge* Act, to exempt himself from liability under the Tothill Fields' Act. As well might it be contended, that the General Metropolitan Act, which enables the commissioners to compel the occupiers to pave the streets in front of their premises, exempts them from contributing to the paving rate. For this reason I think there must be judgment for the defendant.

BOLLAND, B., concurred.

ALDERSON, B.—The 122d section is introduced for the purpose of a special exemption. In other respects the liability of the inhabitants of the *Vauxhall Road*, does not differ from the liability of a party occupying premises by the side of a road, which he is bound to repair *ratione tenuræ*.

GURNEY, B., concurred.

Judgment for the defendant.

## THURNELL v. BALBIRNIE.

THE first count of the declaration stated, that before and at the time of making the agreement and the promise and the undertaking of the defendant thereafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenants thereof to the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, &c., of the plaintiff, of great value, to wit of, &c.: and thereupon heretofore, to wit, on the 26th of *December*, 1836, it was agreed by and between the plaintiff and the defendant in manner following: that is to say, the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. *Newton* and Mr. *Matthews*, or their umpire; and the plaintiff said, that the said Mr. *Newton* was appointed by or on behalf of the plaintiff, and the said Mr. *Matthews* by and on behalf of the said defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that *Newton*, on behalf of the plaintiff, was ready and willing to value the said goods, &c., and at the request and by the authority of the plaintiff, requested *Matthews* to value the same, whereof the defendant and *Matthews* had notice, but that the defendant and *Matthews* then and there continually neglected and refused so to do; and the plaintiff further said, that the plaintiff afterwards, to wit, on the 2nd of *February*, 1837, gave notice to the defendant, that the plaintiff's said appraiser and valuer, the said *Newton*, was ready to meet the defendant's appraiser and valuer, the said *Matthews*, or any other person he might think proper to nominate for the purpose, on the defendant's behalf, at any time within ten days from the said 2nd of *February* which the defendant might fix, to value the said goods, &c., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said *Matthews*, to value, and wholly neglected and refused to nominate any other appraiser, and during all that time has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued, according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, &c., or to let the same be valued, according to his said agreement and promise. And thereupon the said Mr. *Newton* afterwards, and after the lapse of a reasonable period of time, to wit, one month from the day and year last aforesaid, proceeded to value, and did then value, the said goods, &c.; and the price thereof, upon such valuation, reasonably amounted to the sum of 500*l.*, whereof the defendant had notice, and was requested to pay the same to the plaintiff. And the plaintiff further says, that he hath always, from the time of making such valuation as aforesaid, been ready and willing to sell and deliver to the defendant the said goods, &c., and to receive payment by him of the value thereof, whereof

*Assumpsit for the value of goods.* The declaration stated an agreement between the plaintiff and defendant, whereby the defendant agreed to take certain goods at the valuation of N. and M. It was then averred that N., on behalf of the plaintiff, was ready and willing to value for plaintiff, and requested M. to value the same; but that the defendant and M. neglected and refused so to do; that the plaintiff gave the defendant notice, that N. was ready to meet M., or any other appraiser, on defendant's behalf, at any time within ten days which the defendant might appoint, to value the goods; that defendant refused to appoint any day for M. to value, or to nominate any other appraiser, or to take any steps to value, or cause or procure the same to be valued, and during all the time aforesaid refused to value the goods or let the same be valued; whereupon the said N., after the lapse of one month, proceeded to value, and did

value, the said goods; and the price upon such valuation amounted to 500*l.*, whereof the defendant had notice, and was requested to pay the same. Breach, that the defendant would not take the goods or pay for the same. *Held*, on special demurrer, that the count was bad; for that the defendant was not bound by his agreement to take the goods until they were valued by M. and N., unless it was distinctly alleged, in the declaration, that the defendant refused to allow M. to make a valuation.



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the defendant hath always had notice; yet the defendant not regarding, &c., did not nor would, although often requested, take the said goods, &c., so agreed by him to be taken as aforesaid, and pay the plaintiff the value thereof, but hath hitherto wholly neglected and refused so to do, whereby, &c. &c.

There were also other counts upon which nothing turns.

*Special demurrer* to the first count and *joinder*.

*Kelly*, in support of the demurrer.—The declaration charges the defendant with not having taken the goods and paid the value. How could he have done so until the goods were valued according to the agreement? There is no undertaking that, in a given event, Mr. *Newton* alone shall value the goods. The present action is the same as if an action were brought against a party to a submission because the arbitrator refused to proceed to the arbitration. He was here stopped by the Court.

*Hoggins, contrò.*—There is a specific averment in the declaration, that after *Matthews's* refusal to value, the defendant had notice that *Newton* was ready to value, and it is charged "that the defendant wholly refused to let the goods be valued according to the said agreement." This is enough to render him liable to pay the price of the goods. In *Hotham v. East India Company (a)*, it is one of the points decided, that if defendants prevent the performance of conditions precedent by their neglect and default, it is equal to performance by plaintiffs. In *Rayney v. Alexander (b)*, which was assumpsit by the plaintiff for the non-delivery of fifteen tod of wool purchased by him, out of seventeen of which the defendant was possessed, the declaration was held bad for not averring that the plaintiff had selected the fifteen tod out of the seventeen, which was a condition precedent on his part; but it was agreed by the Court, that if the defendant had refused to allow the plaintiff to make his selection, that would have excused the default. On the authority of these two cases, therefore, the defendant is clearly liable for the price.

LORD ABINGER, C. B.—I am of opinion that the first count of the declaration is bad. The agreement is, that the defendant would purchase the goods after a valuation by *Newton* and *Matthews*. There is nothing to shew that the defendant prevented *Matthews* from valuing. There is a substantial allegation that *Matthews* had positively refused to value; and then comes an obscure passage that the defendant refused to appoint any day for the valuing. How are we to infer that *Matthews* had expressed a willingness to value afterwards, and that the defendant refused to acquiesce. I think, therefore, there is not sufficient on this declaration to make the defendant liable for the price of the goods.

BOLLAND, B., concurred.

ALDERSON, B.—I should rather refer the words "or let the same be valued," to mean, valued by another appraiser instead of *Matthews*.

GURNEY, B., concurred.

Leave to amend on payment of costs; otherwise judgment for defendant.

(a) 1 T. R.

(b) Yelv. 76.

## OAKES and Wife v. WOOD.

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RESPASS for assaulting the female plaintiff, and, with the defendant's hands, and with a truncheon, striking her on the head, ribs, legs, &c., beating, bruising, wounding, and ill-treating her, and with the said truncheon striking and thrusting her down to and upon the ground, by which she was greatly beat, bruised, and wounded, and her thigh-bone was broken.

*Plea*—First, not guilty. Secondly, as to assaulting, beating, and ill-treating the female plaintiff, that before and at the time when, &c., the defendant was lawfully possessed of a public-house, into which the said female plaintiff, a little before the said time when, &c., entered, and made a great noise and disturbance therein, and behaved and conducted herself in a rude, quarrelsome, and uncivil manner there, and disquieted the defendant and his family in the peaceable occupation and enjoyment of his house, whereupon the defendant requested her to cease from making such noise and disturbance, and depart out of his said house, which she refused to do; whereupon the said defendant, in defence of the possession of his house, gently laid his hands upon her, and gently pushed her, in order to remove her, and did then and there move her from the said house, as he lawfully might for the cause aforesaid, which are the same supposed trespasses, &c.

*Replication de injuriâ.*

At the trial, before *Bosanquet*, J., at the last assizes for the county of Essex, it appeared that the plaintiff *Oakes* had brought some rabbits in a basket into the defendant's public-house. The rabbits were taken in joke by some of the persons in the public-house, and the defendant himself was a party to the joke. *Oakes's* wife came in the evening to fetch her husband away, but he refused to go until he found his rabbits. It was alleged by the defendant's witnesses that the wife, upon this, used violent and abusive language, and created a great disturbance. It was not proved distinctly who gave the first blow; it appeared, however, that, in the course of the quarrel, the defendant fetched a constable's staff, and struck *Oakes* more than once, and also that he pursued his wife into the lobby, where he struck her to the ground by the blow of the staff on the head, and that in her fall she broke her thigh. The learned judge, in summing up, told the jury that, if they were satisfied an assault was committed by the defendant on the wife, the next question for their consideration would be, whether the defendant struck her in consequence of the disturbance she had made, and in order to remove her from the house; or whether it was in consequence of his quarrel with her husband. If the jury should be of opinion that it was on the latter account, his lordship said he did not think he was justified on the pleadings. The jury found for the plaintiff, *pages 201.*

In the following term, *Jervis* obtained a rule *nisi* for a new trial, on the ground of misdirection; and contended, that the *cause* alleged in the plea, and the *motive* of the defendant, was all that was in issue on the pleadings.

*Evans* and *Cottingham* now shewed cause.—The learned judge was correct

Trespass for assaulting and beating the plaintiff. Pleas, not guilty; secondly, that defendant was lawfully possessed of a public-house, into which the said plaintiff entered, and made a great noise and disturbance therein, whereupon the defendant requested her to cease from making such noise and disturbance, and to depart out of his house, which she refused to do; whereupon the defendant gently laid his hands upon her, and removed her from the house. *Replication de injuriâ.* Held, that, there being proof of the fact of a noise and disturbance in the house, in consequence of which the defendant was legally entitled to remove the plaintiff, the *motive and intention* of the plaintiff in so removing her could not be inquired into under the replication *de injuriâ.*

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in his direction to the jury. If the defendant struck the wife in consequence of his quarrel about the rabbits, and not on account of the disturbance, he has not proved his justification. The general replication in the present case puts the defendant to prove that the female plaintiff was struck and turned out of the house for the "cause" alleged in the plea. It is necessary for the defendant to shew that he acted in consequence of that "cause," which in this case was the disturbance. [Alderson, B.—Could you not have new-assigned, that although the noise was made, and the disturbance created, still that the "cause" for striking and abusing the wife was different?] It is unnecessary, inasmuch as the language of the traverse is, that the defendant did the act of his own wrong, and *without the cause alleged*. This "general traverse," it is apprehended, puts in issue every matter essential to the justification of the defendant under his plea. Even supposing that the plaintiff was making a disturbance, what consequence was that when the jury find that there was another cause besides that stated in the plea. It was a matter of fact essential to the plea that the defendant should prove that the real cause was the disturbance; this he has not done, as the finding of the jury shews. The case of *Lucas v. Nockells* (a) will support the direction of the learned judge; that case shews that the cause alleged is a traversable matter of fact. It was clearly a material part of the defence to shew that the cause alleged in the plea was the real ground of defence. [Alderson, B.—You first put the party to prove the disturbance, and then say, "Suppose a disturbance was committed, still that was not the 'cause' for committing the assault. There is no doubt that the fact of the disturbance is in issue."] This is within the principle that where several facts go to constitute a single ground of defence, the whole defence must be proved. Suppose the landlord of a house assaults a customer from private pique, can he justify the assault on the ground that the plaintiff was making a noise? [Parke, B.—The difficulty arises from the case of *Lucas v. Nockells*. Before that case I thought the motive was of no importance, if a defendant had not exceeded the law; and, if he had, that it ought to be the subject of a new-assignment. However, there is a difficulty how to distinguish that case from the present.] If that case be law, it is conclusive as to the present. He was then stopped by the Court.

*Jervis and Welsby, contra.*—This case is distinguishable from that of *Lucas v. Nockells*. In that case, indeed, it was held, that a *virtute cujus* is traversable, if it involve matter of fact. Therefore, where the defendant justified an entry into plaintiff's ship, a seizure of goods there, and sale of them, by virtue of a *fi. fa.* against the goods of A. B.; and plaintiff, admitting the *fi. fa.*, replied *de injuriâ absque residuo causæ*; it was held, that, under this issue, he might shew that the defendant, although in possession of a *fi. fa.*, did not seize in order to levy, and did not levy money by sale under the writ; but, being consignee of the goods, merely exhibited the writ, in order to defeat a claim of the plaintiff for freight, and then sold the goods in the character of importers. But neither the counsel in argument in the court below (b), nor the judges in the House of Lords, admitted that there was any question as to the traverse of the notice. The present Attorney-General, in the court below, says, "There is no traverse here of motive or intention; nor was the question

(a) 10 Bing. 157.

(b) 4 Bing. 738.

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of motive left to the jury, but simply whether the goods were *bond fide* taken under the execution. It is admitted that the defendants below were armed with the authority of the writ, and that they might, if they pleased, have taken the goods under that authority; but the traverse is of a *matter of fact*, namely, that, though furnished with the writ, they abandoned it, and did not act under it." So *Bosanquet, J. (c)*, says, "It may be admitted, that the object and motive with which the process of the law is put in execution, are not the subjects of traverse, nor, consequently, of evidence under the replication *de injuriā abque tali causā*; and to this extent, and to this only, do the cases cited appear to me necessarily to go. If nothing more be done than is required by the exigency of the writ, the act will be justified, whatever be the motive of the party, or the cause which leads him to employ the process of law." *Littledale, J. (d)*, says, "I think, that, if the evidence was to prove that the goods were never seized in execution at all, then the plaintiff might shew that the acts of the defendants were not done in execution of the writ, but for another purpose, under another claim; and that the writ and the proceedings under it were a mere colour and contrivance to get possession of the goods. But if the goods were once actually taken in execution, then I think the evidence would not be admissible." *Bayley, J. (e)*, says, "Where a *virtute cujus* is a mere inference of law, drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a pure question of fact, I believe all the authorities are that it may be traversed." Now the present case is a conclusion of law, viz., that a party, in whose house a disturbance is made may turn out the disturber, provided no unnecessary violence is used. In *Reeve v. Taylor (f)*, it was laid down by *Littledale, J.*, that a defendant justifying under *son assault demesne*, must shew an assault by the plaintiff commensurate with the violence of which he complains. But it was said, in *Penn v. Ward (g)*, that his lordship afterwards retracted that opinion. In this latter case, which was trespass for an assault and battery, the defendant justified, on the ground that the plaintiff had misconducted himself as defendant's apprentice, wherefore he moderately chastised him; the plaintiff replied *de injuriā*; and it was held, that this traverse only put in issue the misconduct, and that excess ought to have been new-assigned. [*Alderson, B.*—No doubt, in *Penn v. Ward*, the punishment was given for the "cause" alleged, viz. chastisement for misconduct; the defendant only exceeded the "cause."] If *Lucas v. Nockells* be carried to the extent contended for, a new assignment will in no case be necessary. Put the case of a justification in slander on the ground that the words were true; could the plaintiff, under *de injuriā*, shew that the defendant did not believe the words to be true, or that he spoke them in consequence of a previous disagreement? Another consequence of extending *Lucas v. Nockells* will be to make every replication double.

Secondly, as to the form of the plea. [*Parke, B.*—The wounding, bruising, and beating with a truncheon, is not covered by your justification.]

*Cur. adv. vult.*

(c) 10 Bing. 165.  
 (d) Ibid. 182.  
 (e) Ibid. 183.

(f) 4 Nev. & Man. 470.  
 (g) 2 C., M., & R. 338.

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On a subsequent day, the judgment of the Court was delivered by

PARKE, B.—[His lordship stated the pleadings, and then continued.]—It is clear that this plea does not attempt to justify either the blows with the truncheon, or the thrusting the female plaintiff down with the truncheon; consequently, if those facts were proved to the satisfaction of the jury, the plaintiff was entitled to damages for them upon the plea of not guilty; and on reference to the report, it admits of no doubt that those trespasses were so proved, and that the damages were given for them, as there was not any distinct evidence of any other trespasses; consequently, supposing the learned judge to have been wrong in his direction to the jury, and that it was not competent, upon the issue *de injuriâ*, &c., to inquire into the nature or intention with which the violence was inflicted by the defendant, and therefore the special plea ought to have been found for the defendant, still the plaintiff would be entitled to his verdict, and to the damages, on the plea of not guilty; and if the plaintiff will consent to allow the verdict to be entered, on the special plea, for the defendant, no new trial ought to be granted.

We cannot help thinking that the learned judge was not right in the opinion he expressed. Before the case of *Lucas v. Nockells*, there could have been no doubt but that, under this general traverse, the only question to be tried would have been, whether the defendant was authorized to lay his hands upon and remove the female plaintiff from his house; that is, whether the house was the defendant's; whether, (if it was a public house,) the female plaintiff was behaving in the manner described by the plea, was requested to depart, and refused. The defendant's motive for using force to turn her out, whether it was a previous feeling of hostility to her, or from a sudden transport of passion, excited by the blow of the husband, could not have been made matter of inquiry. If more than necessary violence had been used on that occasion, it ought to have been the subject of a replication, and would have made the defendant a trespasser *ab initio*. If the plaintiff was proceeding for an assault committed at a time when the authority given by law did not exist, a new assignment would have been necessary.

The whole difficulty as to the law upon the question arises from the case of *Lucas v. Nockells*, by the decision of which we are bound; and if that case had established the general proposition, that the *motive* and *intention* with which an authority given by law was exercised, could have been inquired into on the general replication *de injuriâ*, we must have held, that such course must be pursued in all cases, though it might be at variance with the supposed rules of law existing before. But we do not find any such general proposition established, either by the opinion of the majority of the judges, or the judgment of the House of Lords, so far as can be collected from the report of their lordships' proceedings. Lord *Wynford* and Mr. Justice *Gaselee* proceed, in a great degree, upon the new assignment in that case, (as the Court of Exchequer Chamber had done before,) although they also consider that the subsequent disposition of the effects under the writ was in issue. Mr. Baron *Bayley*, Mr. Justice *Littledale*, and Mr. Justice *Bosanquet*, disclaimed proceeding upon a new assignment. My brother *Bosanquet* thought that the sale and levy in satisfaction of the debt were properly in issue, admitting that the object and intention with which the process of the law was put in execution, were not the subjects of the traverse. Mr. Justice *Littledale* seems, from some ex-

pressions, (in 10 Bing. 185,) to have been of opinion, that motive need not be inquired into, if all, and no more than all, was done, which the law requires to be done, to comply with the exigency of the writ; but whether all was done that the law required, he thought was in issue. My brother *Bayley* does not express any opinion to the contrary, as to the motive and intention not being in issue. The case of *Lucas v. Nockells* cannot, therefore, be considered as an authority for the general proposition, that motive and intention can be the subject of inquiry on the general traverse.

We, therefore, think that the rule must be discharged, on the terms before mentioned.

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### DOR d. POSTLETHWAITE v. NEALE.

**A**N EJECTMENT having been brought by the present defendant for the recovery of the same premises which formed the subject of suit in the present action, he obtained a verdict. In *Michaelmas* Term last, a cross-ejectment was commenced by the present lessor of the plaintiff, but subsequently discontinued by him, after having delivered a replication. No notice of trial had been given by the lessor of the plaintiff. The master, on taxation, allowed the defendant the costs of preparing the instructions for the briefs and the draft briefs, but refused to allow the costs of the copies of the briefs.

Where no notice of trial has been given, the plaintiff having discontinued, the defendant is not entitled to the costs of the drafts or copies of the briefs.

The premises were situate near *Ulberston* in *Lancashire*; the defendant and his attorney resided at *Billericay*, in *Essex*. The 11th of *March* was the last day for giving notice of trial for the *Lancaster* assizes, and the briefs had all been copied before that day. It was stated, that it would have been wholly impossible for the defendant to prepare the briefs if notice was only given on the 11th; as such notice would not have reached him until the 14th, and he could not have reached *Ulberston* until the 16th of *March*.

*Wightman*, for the defendant, contended that, under the peculiar circumstances of the case, the defendant was justified in preparing the briefs.

*Chilton, contrd.*—The master was wrong even in allowing the draft briefs; the invariable rule being, that where no notice of trial is given, the defendant is not entitled to them. The costs of the copies cannot possibly be allowed.

**PARKE, B.**—The master informs me that the strict rule is, that the costs of the draft briefs should not be allowed; it is proper, therefore, to abide by the practice; as to the copies, they cannot possibly be allowed, as the attorney could easily have them copied in one day in *London*.

Rule absolute for lessor of plaintiff. Defendant's rule discharged with costs.

## POPE v. MANN.

A rule to plead before notice of declaration is an irregularity; but is waived by taking out a summons for time to plead.

A notice of taxation of costs is unnecessary where an appearance has been entered for the defendant by the plaintiff.

A NOTICE of declaration was delivered, together with a demand of plea, on the 28th of *April*. A rule to plead was given before notice of declaration. Judgment for want of a plea was signed by plaintiff on the 2nd of *May*. Two summonses for time to plead had been taken out by the defendant. An appearance had been entered under the statute, and no notice of taxing costs had been given.

*Shee* obtained a rule *nisi* to set aside the judgment for irregularity.

*Moody* shewed cause.—The question will be, had the plaintiff a right to sign judgment on the 2nd of *May*? and it is contended he had. It may be admitted, that it is irregular to give a rule to plead before notice of declaration. *Bennet v. Smith* (a). Here, however, an appearance was entered for the defendant under the statute, and there are cases which shew that, under such circumstances, he is not entitled to a demand of plea. [*Parke*, B.—A rule to plead is different.] It has never been decided in this court, that a rule to plead must be after notice of declaration. Besides, the irregularity has been waived by the defendant taking out summonses for time to plead. *Nisgee v. M'Donnell* (b). Next, as to the notice of taxation. No notice of taxation was necessary, as the defendant has not appeared. By the rule of Hil. T. 4. Wm. 4, s. 17, "notice of taxing costs shall not be necessary in any case where the defendant has not appeared in person, or by his attorney or guardian, notwithstanding the general rule of *Trinity* Term, 1 Will. 4, s. 12."—Finally, the defendant cannot set aside the judgment on payment of costs, as his affidavit of merits is too uncertain.

*Shee, contrd.*—The judgment was irregular for want of a rule to plead, subsequent to notice of declaration. [*Parke*, B.—The summonses for time to plead have waived that irregularity.] The summons was never attended by the plaintiff; he treated it as a nullity, and is not now entitled to insist upon it. Again, notice of taxation was necessary; the rule of H. 4 Wm. 4, only applies where the plaintiff's proceedings have been regular. [*Parke* B.—The words of the rule are "in any case where the defendant has not appeared;" they are quite conclusive.]

Lord ABINGER, C. B.—I think all grounds of irregularity have been sufficiently answered, and the affidavit of merits is insufficient.

Rule discharged, with costs.

(a) 3 Bing. N. C. 305.

(b) 3 Dow. P. C. 579.

## EVANS v. CHESTER.

**D**OWLING had obtained a rule to shew cause why the defendant should not be discharged out of the custody of the sheriff of *Somersetshire*. The action was brought against the defendant in her maiden name; between the service of the writ and declaration she had intermarried with *Chester*; the plaintiff signed judgment and took her in execution on a *capias ad satisfaciendum*. No settlement was made upon the marriage.

An action was commenced against a feme sole; between the service of the writ and declaration she married; the plaintiff proceeded to judgment, and sued out a *capias ad satisfaciendum* against her, and took her in execution. The affidavit, upon which it was moved to discharge her out of custody, stated that no settlement had been made upon the marriage; but did not state that she had no separate property. *Held*, that on this affidavit she was not entitled to her discharge.

*W. H. Watson* shewed cause.—Where the action is against the wife before coverture, she may be taken in execution on the judgment. In *Cooper v. Hunchin (a)*, it was decided, that where, after interlocutory judgment against a feme upon a contract, she marries, yet the plaintiff may proceed to judgment and execution against her, without joining the husband by *scire facias*; and a *capias ad satisfaciendum* following the judgment is regular, although the plaintiff had notice of the marriage before. Moreover the affidavit ought to state that she has no separate property.

**PARKER, B.**—The husband may bring a writ of error. Even if the execution had been against both husband and wife, the latter would not be entitled to her discharge, as her affidavit contains no statement that she has no separate property; all that it says is, that no settlement was made upon the marriage.

**BOLLAND, ALDERSON, and GURNEY, Bs., concurred.**

Rule discharged with costs.

(\*) 4 East, 521.

## PARTRIDGE v. WALBANK.

**M**A RTIN had obtained a rule to shew cause why the *distringas*, appearance, and subsequent proceedings in this case, including the judgment which had been signed by the plaintiff, should not be set aside for irregularity.

In the affidavit upon which the *distringas* was obtained, it was sworn, that the plaintiff was informed and believed that the defendant had gone abroad. The *distringas* was in the common form, requiring the defendant to appear within eight days, or that, in case of default, the plaintiff would enter an appearance for him under the statute. No appearance having been entered by the defendant, and the returns to the *distringas* being *nulla bona* and *non est in-*

The affidavit, upon which a *distringas* to compel an appearance was obtained, contained a statement that the defendant was abroad; the plaintiff entered an appearance for the defendant and signed judgment.

*Held*, irregular as the proper course was to have proceeded to outlawry.



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*ventus*, the plaintiff accordingly proceeded under the statute, and signed judgment. It was also sworn that the defendant was still abroad.

*Martin* contended, that the *distringas* and all subsequent proceedings were irregular, as only applicable to the case of a defendant in this country; and that if the plaintiff had acted properly he would have proceeded to outlawry, the defendant being abroad. *Fraser v. Case(a)*, *Price v. Bower(b)*, *Simpson v. Lord Graney(c)*, *Jones v. Price(d)*.

Sir *W. W. Follet*, *contra*, insisted that, as the order for the *distringas* was general, the plaintiff was entitled to proceed upon it in any way he liked.

**PARKER, B.**—Your proceedings are irregular.

Rule absolute, with costs(e).

(a) 1 D. P. C. 725.  
 (b) 2 D. P. C. 1.  
 (c) *Ibid.* 10.

(d) *Ibid.* 42.  
 (e) *Vide Vere v. Gower*, 3 B. N. C. 503.

### FARR v. WARD.

A. sold cattle to B., for which B. paid by an acceptance, in which a blank was left for the drawer's name, and which he remitted through the post to A. D. & Co. afterwards received this bill, (purporting to be in the name of A., as drawer and indorser,) for a valuable consideration. A. denied that he had ever received the bill or that he had ever authorized payment by an acceptance, and also stated that the drawing and indorsement were forgeries. A. having brought an action against B. for the debt, and D. & Co. having threatened to sue him also upon the bill; *held*, that B. was not entitled to relief under the first section of the Interpleader Act.

THE defendant having purchased cattle from the plaintiff, paid him a portion of the price, and accepted a bill for 220*l.*, the residue, which he remitted by post to the plaintiff, leaving a blank for the drawer's name. The bill was afterwards paid into the bank of Messrs. *Bromage* and *Sneyd*, for a valuable consideration, purporting to be in the name of the plaintiff as drawer and indorser. The plaintiff denying that he had ever consented to a payment by an acceptance, or that he had received the bill, and also asserting that the drawing and indorsement were forged, applied for payment to the plaintiff, and afterwards commenced an action for the sum that remained unpaid. The bankers, likewise, threatened to sue the defendant, as acceptor, on the bill. The defendant applied to the Court for a rule under the first section of the Interpleader Act, 1 & 2 Wm. 4, c. 58, to compel the respective claimants to appear before the Court, and abide by its decision in respect of their claims.

*John Evans*, on behalf of *Bromage* and *Sneyd*.—This Court has no jurisdiction under the Interpleader Act, in a case like the present. The very title of the act shews this, as it is an "Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having *no Interest* in the Subject of such Claims." This cannot apply to a party in the defendant's situation, who has a very deep interest in the subject-matter of the claim, as he is liable to the holders as acceptor of the bill. The act applies to a person in the situation of a mere stakeholder. In *Braddick v. Smith(a)*, the Court of Common Pleas held, that the Interpleader Act did not apply where the defendant had a legal claim.

*E. V. Williams*, for *Farr*.—The drawing and indorsement are both forge-

(a) 9 Bing. 81.

ries. The debt remains still unpaid to the plaintiff, and therefore he has a perfect right to sue the defendant for it.

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*G. J. White*, in support of the rule.—The defendant has no such interest in the subject matter as to disentitle him to the protection of this act. *Bromage* and Company have no claim to the bill, except through the indorsement of *Farr*, either in person or through his agent. If this indorsement be a forgery, then they have no right whatever. [*Parke, B.*—They have a right; it was the folly of your client to accept a bill, leaving a blank for the drawer's name.] It has been held, in the case of *Johnson v. Windle (b)*, that a forged indorsement can confer no title.

*PARKE, B.*—This is generally true; but, in the present instance the defendant, by allowing the bill to go out in blank, is estopped from saying that the indorsement is not genuine, as the acceptance admits the hand-writing of the drawer.

*ALDERSON, B.*—This is not a case of interpleader. It cannot be said that, in the present case, there are cross claims to the same subject-matter. *Bromage* and Co. claim in respect of the bill; your answer to them is, that the drawing and indorsements are forgeries. *Farr* claims in respect of the debt; you reply that he sold you cattle, and that you paid him by a bill. It is not plain that you may not be liable to both parties, and if so our jurisdiction is taken away.

Rule discharged, with costs.

(b) 3 Bing. N. C. 225.

## DOE dem. WYTHE and others v. RUTLAND.

**EJECTMENT** to recover possession of an estate, called the *Testerton* Estate.

At the trial, before *Ld. C. J. Tindal*, at *Norfolk* summer assizes, 1836, the jury found a verdict for the lessor of the plaintiff, subject to the opinion of the Court on the following case:—

*Benoni Mallett*, being seised in fee of land called the *Testerton* Estate, devised the same to the use of *Phillip Mallett* Case for life, with an ultimate remainder to his daughter, in tail general, under which limitation *Mary* the wife of *Thomas Wythe*, (the lessor of the plaintiff,) became, on the death of the said *Phillip Mallett* Case, on the 4th *July*, 1834, tenant in tail in possession of the *Testerton* Estate, but, as to the premises sought to be recovered in this action, subject, as the defendant contended, to the lease hereinafter mentioned.

The will contained the following power of leasing, viz.—“Provided always, and my will is, that it shall and may be lawful for my said grandsons, *Thomas*

*A. B.*, by his will, empowered his devisee for life to demise for 21 years, “so as upon every such lease there be reserved and be made payable, during the continuance thereof, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of

fine or income for or in respect of such lease or leases: and, that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved.” The tenant for life made a lease, under this power, for 21 years, to commence on the 11th of *October*, 1833, at the yearly rent of 903*l.* payable on the 6th day of *April* and the 11 day of *October*, in every year, by equal portions, except the last half years’ rent, which was thereby reserved and agreed to be paid on the 1st day of *August* next before the determination of the said term. There was also a proviso for re-entry, if the rent should be 42 days in arrear. *Held*, that the lease was a good execution of the power.

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*Mallett Case*, and *Phillip Mallett Case* and all their sons, and all other person and persons respectively who shall come into and be in the actual possession of my said hereinbefore devised manors, estates, and premises, including the said *Middleton Estate* and *Testerton Estate*, or any part thereof, or be actually entitled to the rents and profits thereof, or any part thereof, by indenture under their hands and seals, to demise and lease the same, or any part thereof, unto any person or persons, for any term or number of years, not exceeding twenty-one years in possession, and not in reversion, remainder, or expectancy, so as upon any such lease there be reserved and be made payable, during the continuance thereof respectively, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and so as none of the said lessee or lessees be made punishable of waste by any express words therein, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved, and so as such lessee or lessees, to whom such lease or leases shall be made, seal and deliver counterparts of such lease or leases."

On the 14th of *December*, 1833, the said *Phillip Mallett Case*, being then in the actual possession, or actually entitled to the rents and profits of the *Testerton Estate*, under the limitation of the will, signed and sealed, in the presence of two credible witnesses, an indenture of lease of that date, between the said *Phillip Mallett Case*, of the one part, and *Margaret Rutland*, (the defendant in this action,) who then and there sealed and delivered a counterpart thereof, of the other part, whereby it was witnessed that, by virtue of the power of leasing, in the said will contained, and in consideration of the rent, covenants, and agreements of the said lease, reserved and contained on the part of the said *Margaret Rutland*, the said *Phillip Mallett Case* demised unto the said *Margaret Rutland* the premises therein mentioned, being the premises mentioned in the declaration in this said action sought to be recovered, the said indenture containing therein, amongst other things, as follows:—"To have and to hold the said premises unto the said *Margaret Rutland* and her executors and assigns, from the 11th day of *October* last, for and during the term of twenty-one years, thence next ensuing, yielding and paying therefore, unto the said *Phillip Mallett Case* and his assigns, during such part of the term of this demise as he shall live, and, after his decease, unto such person or persons as for the time being shall be entitled to the reversion of the said premises, the yearly rent of 903*l.* of lawful money current in *Great Britain*, by equal half-yearly payments (that is to say,) on the 6th day of *April* and the 11th day of *October*, in every year, by equal portions, except the half-year's rent, which is hereby reserved and agreed to be paid on the 1st of *August* next before the determination of the said term, which said rent hath been adjudged by two different and skilful persons, viz. Messrs. *William Wright* and *Edward Seppings*, to be the full annual value of the said premises. Provided always, that if the said rent, or any part thereof, shall be unpaid for forty-two days next after any of the days whereon the same is reserved to be paid, as aforesaid, then it shall and may be lawful for the said *Phillip Mallett Case* or his assigns, during his life, and after his decease for such person or persons as aforesaid, into the said demised premises or any part thereof, in the name of the whole, to there enter, and the said *Margaret Rutland* and her executors, administrators, and assigns, and all other occupiers thereof, to expel, put out, and remove therefrom."

The said lease contains the following covenants on the part of the lessor: viz., "That it shall be lawful for the said *Margaret Rutland* and her executors, administrators, and assigns, paying the rent and performing the covenants herein contained which on her or their part ought to be performed, to hold and enjoy the premises hereby demised during the said term of twenty years, and to use the barns and the stack-yards thereto belonging, for the purpose of threshing and dressing the corn, grain, and pulse which shall be produced from the said premises in the last year of the said term, until the 1st of *August* next after the determination thereof, without interruption." And there were also all usual and necessary covenants on the part of the lessee, supposing the court to be satisfied, that the covenants herein stated are of that description. It is also agreed that no question shall be raised or considered as to the amount of the rent."

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*d.*  
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The question for the opinion of the Court was, whether the lease of the 14th *December*, 1833, was a valid execution of the leasing power contained in the will of *Benoni Mallet*?

Sir *W. W. Follett*, for the lessors of the plaintiff.—First, the reservation of the last half-year's rent payable on the 1st of *August*, is a violation of the power. By the terms of this power the rent is to be reserved, payable equally during the continuance of the term; and, so far as the payments are to be made on the 6th of *April* and on the 11th of *October*, no objection can arise. But it is not so with the last half year's rent payable on the 1st of *August*; because thereby, in case the tenant for life who had received the rent on the 1st of *August*, were to die on the following day, the lessee would enjoy the premises until the 11th of *October*, and the remainder-man would be kept out of possession for that period of time, without receiving any rent. This amounts to a receiving of rent by anticipation, on the part of the tenant for life, which he has no right to do. The rent ought to be paid in equal proportions; and the principle is, that it should be so distributed as that the tenant for life may receive his proportion for the part which runs through his life, and the owners of the reversion for that which comes after. If a reservation, such as is made in the present case, is not an infringement of the power, then there would be nothing to prevent the tenant for life from reserving a rent, the whole of which should be payable on the first day of the year. This is shown by the case of *Doe v. Giffard* reported in Sugden on Powers, 5th edit., p. 629, and also cited in *Doe v. Wilson* (a). In that case, the power required the best and most approved yearly rent to be reserved. The lease was dated the 14th *September*, 1809, and was for twenty-one years from the date of the lease, payable by two half-yearly payments, on the 29th of *September* and the 25th of *March*, the first payment to be made on the 25th of *March* then next, the lease was held void; because, as the rent was made payable on the 25th of *March* and the 29th of *September*, and the term of the lease would expire on the 14th of *September*, there would be no rent payable under it from the 25th of *March* preceding the expiration of the term. [*Parke*, B.—That is not the case here. In *Doe v. Giffard* the lease under the power is void, because the rent is not reserved for the whole term; it is in fact only reserved for twenty years and a half.] The best way to try the question is this: has the tenant

(a) 5 B. & Ald. 371.

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for life a right to reserve the rent payable on one day? That might possibly be beneficial to the remainder-man, still it would be a violation of the power. The proper course is to reserve the rent equally, and not by way of anticipation. In *Doe v. Morse* (b), the power required that there should be reserved and continued payable, during the respective continuance of such lease and leases, by half-yearly payments, the best and most improved yearly rents that could be reasonably had and obtained. The lease was dated the 11th day of *January*, 1783, to hold from the 4th of *January* preceding, reserving the rent payable on the 1st of *May* and the 29th of *September*, the first payment to be made on the 1st day of *May* then next; and it was held not a due execution of the power. Baron *Bayley*, in defining what is meant by "best rent," says, "according to the terms of the power the party is to reserve the best yearly rent: that cannot be considered the best reserved yearly rent within the meaning of this power, which is not reserved payable at the conclusion of the year." Further he says—"In this lease, the first rent was payable long before half a year's occupation had elapsed; and the second very long before a year's. The tenant for life might thereby obtain a year's rent for less than a year's occupation." The same may be said in this case. [*Parke*, B.—There is this benefit to the landlord in the present case, that by reserving the last half-year's rent payable on the 1st of *August*, the landlord is enabled to distrain for it, which he could not do if it was payable at the end of the term. Besides, in this power, nothing is said as to the days of payment.] *Bolland*, B., in the same case, says, "Had the lessor been dealing with property of his own, he might have reserved the rent at any period of the year; but he has other interests to observe, and he was bound not to put those of the remainder-man or reversioner in jeopardy. Involve the problem as you will, the reversioner may be deprived of rent to which he might otherwise be entitled for some portion of the year." So involve this case as you will, the same result will follow. Next, as to the power of distress and re-entry: in *Sugden on Powers*, 5th edition, 656, all the learning on the subject of clauses of re-entry is collected. The general principle to be deduced from it is, that a reasonable time is allowed. *Jones v. Verney* (c). *Doe d. Lord Jersey* (d). Although, indeed, it has been held, that twenty-eight days was a reasonable time, still the usual period is twenty-one days, and no case has ever gone the length of allowing forty-two days.

*Maule, contrà*.—This is a power in some respects general, in others limited. In those matters in which the testator has chosen to restrict, he has used express words for the purpose; in other cases he has left the matter at large. The true rule of construction is this, that when the party creating the power has expressed conditions, those conditions must be complied with; where he has expressed no conditions, there he leaves the party who acts under the power, at large. The present power directs, that the rent shall be reserved, payable during the continuance of the term, and that it shall be the best yearly rent that can be reasonably had. It is not denied that in these two particulars the directions of the power have been complied with. Nay, the letter of the power would have been complied with, by a reservation of rent

(b) 2 Cr. and M. 247.  
 (c) *Willes*, 160.

(d) 2 Brod. & Bing. 473.

payable at any time during the year. Is this, then, a violation of any implied condition? What is there unreasonable in reserving the last half-year's rent, payable on the 1st of *August*? It is assumed, at the other side, that a lease must necessarily be a bad execution of this power, by which, under any possible circumstance, a remainder-man may be placed in a worse situation; that, however, is not correct. If the tenant for life were expressly to act upon the same principle as if he were the actual remainder-man, what would he have done? Would he not have secured to himself his remedy by distress, precisely as he has done in the present case? If he had consulted the remainder-man upon the subject, is it not obvious that the present reservation is that which the latter would consider the most beneficial to himself? If the last half-year's rent were payable on the 11th of *October*, the tenant would have carried off the crops, and the landlord would be without remedy. The only event in which it would at all be injurious to the remainder-man, would be in case the tenant for life were to die between the 1st of *August* and the 11th of *October*; whereas if the tenant for life were to die before the 1st of *August*, it would be a positive benefit to the remainder-man. The case of *Doe v. Giffard* is clearly distinguishable from the present, as in that case no rent at all was payable for the last half year of the term. In *Doe v. Morse*, the reservation of the rent at unequal periods, was a direct violation of the express terms of the power, which ordered the payments to be reserved half-yearly. [Parke, B.—In *Regina v. Weston(e)*, it was held, that where a statute authorized justices to make an order for the payment of money weekly, they might direct the first payment to be made before the expiration of the week. In that case, *Powell, J.*, says, "If a man had a power to make leases, reserving the ancient yearly rent annually, yet if it were reserved upon a day before the year was up, as if the year ended at *Christmas*, and it was reserved at *Michaelmas*, it would be well, pursuant to the power;" which *Holt* agreed. Secondly, as to the power of re-entry. There must be some latitude given to discretion in saying what shall be a reasonable time for re-entry. In *Doe d. Jersey v. Smith*, twenty-eight days were held not to be unreasonable. It is upon the party making the objection to the period of forty-two days, to shew that it is unreasonable.

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*Sir W. W. Follet* in reply.—The argument at the other side, pushed to its full extent, is this, that, under the circumstances of the present case, the rent might be received payable on the first day of the year. The proper test, it is apprehended, is, not to look at what will benefit the estate, but the person entitled to the estate; viz., in this instance, the remainder-man, whose interest in the estate may be disposed of, by the tenant for life, under certain restrictions. The real principle, then, is, that the remainder-man must not be prejudiced by the conduct of the tenant for life; in other words, if the tenant for life dies, the occupation of his lessee is not to be prejudicial to the remainder-man. This can only be effected by an equitable distribution of the rent. [Parke, B.—That could only be done by reserving it from moment to moment.] The real point, however, is, can a reservation of rent beforehand be good? There is no authority in the books, that a forehand rent is good. The only case bearing upon the point, as shewing the contrary, is the case of

(e) 2 Ld. Ray. 1197.

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*Regina v. Weston*; that, however, is a mere *obiter dictum* of *Powell, J.*, and is cited with a *quære* in the last edition of Sugden on Powers.

*Cur. adv. vult.*

On a subsequent day, judgment was delivered, by—

LORD ABINGER, C. B.—The question in this ejectment turned on the construction of a power, and that power is in these words—(His lordship here read that part of the will creating the leasing power.)—Now, the defence rested on two objections to the execution of the power in the lease produced: the first was, that although there was a clause in it for re-entry for non-payment of rent, yet that the power of re-entry was limited to forty-two days after the rent should have accrued due; the second objection was, that the last half-year's rent was made payable in some day in *August*, whereas the term itself did not expire until *Michaelmas*. In answer to the first objection, cases were cited to shew, that a reasonable time might be allowed after the rent became due, without any contravention of the power; but I am at a loss to see how the question could arise unless there were an appearance of evasion. One can conceive a case where, under the pretence of complying with a power in terms, the clause may be of such a nature as to make the power of re-entry wholly nugatory. If such a case should arise, it would be a violation of the power; but here there is no appearance of evasion in the mode of framing the clause; the period of forty-two days is not an unusual one; and we therefore think that the lease is unobjectionable in respect to the clause of re-entry. The second objection is, that the reservation of rent for the last half-year, is in contravention of the power; but, upon consideration, we think that there is no foundation for the argument urged. On this point the testator's reason for limiting the power, by this proviso, appears, on the face of the will itself, to have been, that no premium or fine should be taken from the lessee; and, therefore, whatever was reserved was to be received annually, and made payable at the usual times, and was not to be taken as a premium or fine, leaving nothing to the person in remainder who might succeed during the continuance of the term. There is no pretence for saying, that there was any object to defeat the remainder-man's claim; on the contrary, the reservation of the last half-year's rent, before the full and complete expiration of the term, is a matter of prudence and caution, and is generally to the benefit of the lessor. Nor can it be detrimental to the remainder-man, except in the single supposable case of the tenant for life dying after the receipt of the last half-year's rent, and before the end of the term. But, in construing this power, we are to look at the intention of the testator as well as to the words of the power; and that intention manifestly was, that the rent should be appointed in twenty-one yearly payments—there is no direction further; but it might be quarterly, half yearly, or yearly, there being no direction on the subject. It would be quite sufficient to make it payable yearly, within the twenty-one years. The spirit and intention, then, of the testator are complied with, as well as the words of the power, and, therefore, there is no objection to the lease on the second ground. On both the grounds, the conclusion to which we come is, that the judgment should be for the defendant.

Judgment for defendant.

## WALKER and another v. RICHARDSON.

Erchequer.

**INDEBITATUS ASSUMPSIT** for tolls. *Plea*—Non-assumpsit. At the trial, before *Patteson, J.*, at the last assizes for the county of *Durham*, it appeared that the plaintiffs were lessees under the Bishop of *Durham* of the port of *Stockton*, and of a toll or duty called anchorage and plankage, claimed to be due on all vessels entering the River *Tees*, and loading and unloading there; and the defendant was owner of a steam-packet called the *Majestic*, which traded between *London* and *Middleborough*, a port on the *Yorkshire* side of the *Tees*. The real question was, whether *Middleborough*, being on the *Yorkshire* side of the *Tees*, was within the port of *Stockton*. The plaintiff put in leases to the mayor and corporation of *Stockton* from 1620 downwards, including a lease of 1829, under which the plaintiffs claimed. The language of the demises generally was, "of the port and creek of *Stockton*." The lease under which the plaintiff claimed bore date the 14th *September*, 1829, for twenty-one years, at a rent of 20*s.*, and granted by the Bishop of *Durham* to the plaintiffs and two other persons, who were dead; which lease contained the following clause: "And it is agreed that the premises are so demised, upon trust, that the said lessees, &c., shall from time to time apply and dispose of the profits to arise from the above-demised premises, for the making and repairing the public streets and pavements within the said borough of *Stockton*, or for or towards the payment of the debts contracted upon that or any other occasion, or for other public uses, within the said borough, and for the public advantage and convenience thereof, in such manner as the mayor, aldermen, and burgesses of *Stockton* aforesaid, for the time being, from time to time to be assembled at the courts to be held for the said borough, or the major part of them, shall from time to time direct or approve." This lease had affixed to it the episcopal seal of the Bishop of *Durham*, was attested by one witness, and not enrolled in Chancery.

It was objected, on the part of the defendant, that as this was a lease to charitable uses, it ought to have been attested and enrolled according to the provisions of the Statute of Charitable Uses, 9 Geo. 2, c. 36, s. 1; the learned judge, however, admitted the lease, giving leave to the defendant to move to enter a nonsuit.

It further was in evidence, that, in the year 1832, the bishop had granted a lease for twenty-one years, (renewable at the end of seven or fourteen years,) to different persons from the lessees in the lease of 1829. This lease was produced from the registry of the bishop, in a cancelled state, as evidence from which the jury might be properly directed to infer a surrender of the former term by the lessors of 1822. The counsel for the defendant insisted that this was not a sufficient evidence of a surrender; and that, therefore, the plaintiffs must be nonsuited, as they were not the proper parties entitled to sue. The learned judge, however, admitted the evidence, and the jury found for the plaintiff.

*R. Alexander* having obtained, on a former day, a rule to shew cause why a nonsuit should not be entered, or a new trial had;

A lease by a corporation sole, of lands already in mortmain, is not affected by the provisions of the statute 9 G. 2, c. 36, s. 1.

A lease had been granted to A. for 21 years by B; but, before the expiration of A.'s term, B. granted another lease of the same premises to C. There was no proof of a surrender in writing by A. of his term, but his lease was found in B.'s custody in a cancelled state; and it was proved that it was the custom to deposit the old leases with B. before a re-grant or renewal. *Held*, that it was properly left to the jury, under these circumstances, to consider, whether there was not sufficient evidence of a surrender of A.'s lease, by act and operation of law, within the 29 Car. 2, c. 3, s. 3.



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*Cresswell* and *Stephen Temple* now shewed cause.—This is not a lease within the 9 Geo. 2, c. 36, no matter by whom it is granted, inasmuch as the trusts declared in it are not such as are included within that act. Admitting that the lease contains trusts “for the making and repairing the public streets and pavements within the borough of *Stockton*, or for or towards the payment of the debts contracted on that or any other occasion, or for other public uses within the said borough, and for the public advantage and convenience thereof, in such manner as the mayor, aldermen, and burgesses shall direct and approve;” it does not necessarily follow that the profits will be applied to the public purposes of the borough. The corporation have an option as to the manner in which they will direct the profits to be applied: for instance, they may apply them in the payment of the corporation debts, contracted “on any occasion;” and this, it is apprehended, would not be a charitable use. Moreover, even if applied to public uses, it has never yet been decided, that all public uses are charitable uses. The 9 Geo. 2, c. 36, enacts, that “no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements, and hereditaments, sum or sums of money, other than stocks in the public funds, be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months before the death of such donor or grantor, including the days of execution and death, and be enrolled in his majesty’s High Court of Chancery within six calendar months next after the execution thereof, &c.” Now nothing is there said of what shall be considered a charitable use. There is in the lease a general direction to apply the profits to the uses directed by the corporation of *Stockton*; but as the direction is in the alternative, either to lay them out for the public advantage, which might possibly be construed to be a charitable use, or in paying the debts of the corporation, which clearly is not so; the trusts are not affected by the statute. In *Doe d. Toone v. Copestake* (a), it was held, that a devise to trustees of a reversion, to be applied by them and their successors and the officiating ministers for the time being of a methodist congregation, as they should think fit from time to time to apply the same, was not a devise to charitable uses. So in *Morice v. Bishop of Durham* (b), a bequest to dispose of the ultimate residue to such objects of benevolence and liberality as the bishop in his own discretion should most approve of, was held not to be a bequest to a charitable use. There is nothing in the language of the trust to prevent the corporation of *Stockton* from directing the profits to be applied to purposes of liberality and benevolence. In *Widmore v. Woodrowe* (c), it was held, that, where there was a bequest to lay out money in either of two ways,

(a) 6 East, 328.

(b) 9 Ves. J. 399. Duke, 567.

(c) Amb. 636.

one of which was legal, the other illegal, the legal one must be adopted. *Swan v. Fomnereau* (d), *Sorresby v. Hollins* (e), *Grimmett v. Grimmett* (f). Besides, it is doubtful whether this lease does fall within the 9 Geo. 2, c. 36. This is not a grant by the Bishop of *Durham* in his individual capacity, but in his corporate capacity; and, if so, there are no words in the statute to include it. The words of the act apply to grants by any "person or persons," and not to grants by corporations. In addition to which, this property, being vested in the bishop in his corporate capacity, is already in mortmain.

Secondly, the jury might very fairly presume a surrender of the lease of 1822. The leases having been found in the depository where the surrendered leases usually were; the lease in question having been also produced in a cancelled state; evidence having been given that the leases were constantly renewed, and that the practice was, to deliver up the former leases uncanceled into the registry of the bishop, where they were subsequently cancelled; all these were circumstances from which a jury might be directed to presume, not a surrender in writing, but a surrender by operation of law. The new lease, it is true, was granted to different parties from those who held under the old lease; but it still contains the same trusts from beginning to end. If the original holders of the former lease had been the new lessees, no question of the admissibility of the evidence could have arisen. But there was sufficient upon which to found a strong presumption that the original lessees had consented to the grant of a new lease to other parties, which would undoubtedly amount to a surrender by act and operation of law. *Thomas v. Cooke* (g). [*Purke*, B.—And this would be equally so, independent of cancellation.] Clearly, because there was evidence of the usual practice as to the return of the old lease, and its production from the proper depository. For what purpose could it have been presumed that the lessee brought back the lease, except with a view to its being cancelled; the cancellation still more confirms this view. This case is distinguishable from *Doe d. Courtail v. Thomas* (h), for there no new lease had been granted.

*Alexander, Addison, and Grey, contrà*.—It is contended, that, as some of the purposes mentioned in the lease are legal, the lease itself is valid. In *Shelford's Law of Mortmain*, p. 183, it is said "Although a positive trust, directing money to be laid out in the purchase of lands for charitable uses, is void, yet, if there be sufficient room for the Court to say, that a discretionary power is given to the trustees to lay out the money either in the funds or in lands, the gift will be sustained; for where a testator has pointed out two modes, the one consistent with the statute, the other inconsistent with it, the Court will adopt that which is legal, and carry it into effect; but it is necessary, in all these cases, to see whether the testator has given such an option, and whether there is an ultimate object consistent with the statute or not." Every case must be governed by its own particular circumstances, and no general principles of law will apply. The words of the present lease are, "for the making the public streets and pavements within the borough, or for or towards the payment of the debts contracted on that or any other occasion, or for other public uses within the said borough." The substantial object of all these

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(d) 3 Ves. 53.

(e) 9 Mod. 221. Duke, 391.

(f) Amb. 210. Duke, 401.

(g) 2 B. & Ald. 119.

(h) 9 B. & C. 288.

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trusts clearly is, that the profits shall be applied to the public purposes of the borough. In *Rolt's* case (i), it was held, that a devise of the profits of rents "to be bestowed yearly upon the reparation of a highway between *Wyel-Elm* and the town, &c., was a charitable use. In *Jones v. Williams* (k), one J. W., by his will, gave 1000*l.*, to arise by sale of his real estate, for the purpose of bringing spring-water to *Chepstow* for the use of the inhabitants for ever: Lord *Camden*, in giving judgment, says, "The definition of charity is, a gift to a general public use, which extends to the poor as well as the rich; and there are many instances of the statute of 43rd Eliz. carrying this idea, as for building bridges, &c." The supplying of water is necessary as well as convenient for the poor and rich; and on these grounds his lordship declared the legacy within the Statute of Mortmain, and void. So this also is a trust for a public purpose, and equally void. The second point made in the argument was, that the statute did not apply to lands already in mortmain. The third section of the act, however, enlarges the force of the preamble, and includes lands already in mortmain. That section enacts, "that all gifts, grants, &c., of any lands, tenements, &c., to or in trust for any charitable uses whatsoever, shall be absolutely, and to all intents and purposes, null and void." It may be conceded, that the object of the statute was to prevent lands getting into mortmain. Another object was, to give publicity to charitable uses. Mr. *Shelford*, on the Law of Mortmain, p. 21, says, "The object of that act was not to prevent alienations in mortmain; but, in the first place, to require the conveyances of lands to charitable uses to be made by deed enrolled within twelve months before the grantor's death, and not to prevent devises of real property, or any interest therein, for any charitable purposes whatever." As, therefore, there was a double object; the second being to ensure publicity, the circumstance that the lands are already in mortmain will not prevent the statute from applying. [*Alderson*, B.—How can you apply the words of the statute, "languishing and dying persons," to corporations?] It has been held, notwithstanding the words "disherison of heirs," that the statute applies to leaseholds, which would not be the case if heirs were to be construed strictly as controlling the operation of the statute, as the executors, and not the heirs, take the leaseholds. *Attorney-General v. Graves* (l). The third section, already cited, is sufficiently large in its terms to embrace all kinds of charitable uses, and is not controlled by the preamble. [Lord *Abinger*, C. B.—The general rule is, that the preamble may extend, but not restrain, a particular section. *Parke*, B.—A devise to a bishop of *Durham* for charitable uses would be void, because the act avoids grants to corporations; the enacting part of the first section only applies to grants by any person or persons, meaning natural persons; and the words of the third section cannot extend the enactment further.]

Secondly, as to the surrender. The mere cancelling, in fact, of a lease, is not a surrender of the term thereby granted, within the Statute of Frauds. *Roe v. Archbishop of York* (m), *Doe d. Courtail v. Thomas*, judgment of *Park*, J. (n). His lordship there says, "The instrument having been once operative as a lease, cannot be got rid of, except by operation of law, or by a deed or act in writing. It is contended, that the presumption in this case is, that there was a surrender by note in writing. The fact of a lease being found in the posses-

(i) Mo. 888. Duke, 368.  
 (k) Amb. 651. Duke, 443.  
 (l) Amb. 155.

(m) 6 East, 86.  
 (n) 9 B. & C. 299.

sion of the lessor in a cancelled state, raises a presumption only that it was the intention of the parties to put an end to the term by cancelling the lease." In *Stone v. Whiting (o)*, where there was an agreement, between a landlord and tenant from year to year, that another tenant should be substituted in his place, who was accordingly substituted; it was held a determination of the former tenancy. There, however, an agreement was shewn between the landlord and the preceding tenant, which is not the case here. The case of *Thomas v. Cooke* is clearly distinguishable from the present. In that case, A., being tenant from year to year, underlet the premises to B., and the original landlord, with the assent of A., accepted B. as his tenant; but there was no surrender in writing of A.'s interest; this was held to amount to a surrender by act and operation of law, because an agreement was shewn between the three parties. Here the lease is granted to entirely different parties, and no evidence is offered to shew an assent by the first lessees.

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LORD ABINGER, C. B.—It appears to me that this rule must be discharged. I am of opinion that the 9 Geo. 2, c. 36, does not embrace this case. Whenever a statute means to include bodies politic and corporate, it always mentions them in its provisions. The object of the present act does not seem at all to point to corporations, as its intention was to prevent improvident "persons" from making wills to the disherison of heirs. The statute, therefore, applies to parties capable of devising, and to things which may be the subject-matter of a devise. It could not, therefore, apply to the bishop in his corporate capacity, as in that capacity he could not make a will; neither could it apply to his corporate property, as that would not be the subject of a devise, being already in mortmain. And it seems to me, that the third section does not carry it further, as it only provides, that conveyances to charitable uses, not made in compliance with the statute, shall be void. It was also objected, that there was no evidence of a surrender of the lease of 1822. I think, however, from the circumstances of this case, that the jury were fairly called upon to presume a surrender by act and operation of law, so as to satisfy the Statute of Frauds.

PARKS, B.—I also think this rule must be discharged. On the first point, I am of opinion that the present grant is neither within the letter nor the spirit of the 9 Geo. 2, c. 36. The object of that statute was to prevent grants by persons languishing or dying, to persons who would hold in perpetuity to the disherison of heirs. There is nothing said in the act as to corporations being granting parties; and thus far it is not within the words of the act; nor is it a grant from a private individual, so as to bring it within its spirit. If this had been a grant to trustees by a private person upon the same trusts, I think it would have been void; as it appears to me that the great majority of the trusts are of a charitable nature, although possibly a trust for the payment of the corporation debts may not be so considered. As to the second point, it would be doubtless a good answer to the plaintiff's claim, to shew that the legal estate was in another party. This would have the same effect in the present case as it would in an ejectment. In my judgment, a subsisting lease would have been a conclusive answer. Cancelling a lease merely, does not put an end to it; and the circumstance of the cancellation is not relied upon

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here as conclusive proof of the determination of the lease, but merely as evidence from which a jury may fairly presume a surrender by act and operation of law; and I think it was admissible for that purpose. Before *Thomas v. Cook*, I should have had a difficulty in saying that this would amount to a surrender; that, however, is a case recognised, by the entire profession, as establishing, that the substitution of a new tenant in the place of the subsisting one, with the assent of the latter, amounts to a surrender by act and operation of law. The only point, therefore, was this—was there evidence from which the jury might presume such a surrender? and it seems to me there was; not relying merely on the cancellation, which is only one link in the chain of evidence, but on the user of the bishop's office, coupled with the cancellation.

BOLLAND, B.—As the case has been so fully gone into by my brother *Parke*, I shall say no more on the first point, than to express my concurrence in the opinion that this lease is not within the 9 Geo. 2, c. 36. I had great doubts as to the surrender on the first impression of the case. The cancellation of the lease would not of itself amount to a surrender; and the naked fact of finding it in the bishop's office, does not appear to me to add greater weight to the presumption. But when I find there is a custom to return the old leases into the office for the purpose of cancellation before the new leases are granted; and also that the corporation of *Stockton* are still the *cestui que trusts*, the only difference being as to the trustees, all my doubts are removed; I therefore think a jury were justified in presuming a surrender by act and operation of law.

Rule discharged.

### WOODS v. READ.

The Municipal Corporation Act, 6 Wm. 4, c. 76, s. 92, does not empower the council of a borough to make a retrospective rate.

THIS was an action of trespass brought by an overseer of one of the parishes within the borough of *Stamford*, against the high constable within the said borough, for levying a distress upon the plaintiff's goods, under the act 5 & 6 Will. 4, c. 76, s. 92. By the consent of the parties, the following case was stated for the opinion of this Court, under a judge's order, in pursuance of the statute 3 & 4 Will. 4, c. 42, s. 25.

After the passing of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, various expenses had been and were necessarily incurred by the borough of *Stamford*, in the county of *Lincoln*, in carrying into effect the provisions of the act; and the borough fund not being sufficient for the payment of such expenses, at a meeting of the council of the said borough, at which the mayor and major part of the councillors were present, the council estimated, as correctly as might be, what amount, in addition to the said borough fund, would be sufficient and necessary for the payment of the expenses which had been so incurred in carrying into effect the provisions of the said act, the amount of such estimate being 2,316*l.* 2*s.* 1½*d.*; and by an order then duly made at such meeting, (after reciting the facts above mentioned,) it was ordered by the council, that a borough rate, in the nature of a county rate, should be made on the said borough, for the purpose of raising the aforesaid sum, so estimated, and, for that purpose, that there should be assessed, and the said council did thereby assess, upon every parish, (naming them,) within the borough

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the several and respective sums therein mentioned, amounting together to 2,237*l.* 10*s.* 1*½d.*, the same being at the rate of 2*s.* 1*½d.* in the pound upon the annual value of the property, rateable to the relief of the poor in the said parishes; and the said council did thereby further order, according to the act 55 Geo. 3, c. 51, and the several other acts relating to county rates, and the said act of 5 & 6 W. 4, that the churchwardens and overseers of the poor of each parish should, out of the money collected or to be collected for the relief of the poor of such parish respectively, pay to the high constable of the said borough, the respective sums of money so as aforesaid assessed upon such parishes respectively, within a certain time in the said order mentioned, next after demand thereof made in writing, to be given to the churchwardens and overseers, and that the high constable being also the treasurer of the said borough should pay over the monies, when received, to the borough fund, to be applied pursuant to the provisions of the Municipal Act; and upon refusal of the churchwardens and overseers to pay the sums assessed upon their respective parishes, the high constable was thereby empowered to levy the same by distress and sale of the goods of the overseers so refusing, having first obtained a warrant for that purpose. In pursuance of this order, the defendant, as high constable, holding a warrant for collecting the borough rate, issued his warrant to the overseers of the poor of the parish of *St. Mary*, (being a parish within the said borough,) requiring them to pay 179*l.* 2*s.* 9*d.*, being the proportion of the said parish towards the said borough rate. The overseers of the said parish refused to pay any part of the said sum to the defendant as the high constable. The case then stated that the plaintiff was duly summoned for the non-payment, and that a warrant of distress was issued by the mayor, directed to the defendant, commanding him to distrain for the said sum upon the plaintiff's goods, and proceed to a sale, if the money was not paid within five days. Under this warrant the defendant took and distrained the goods mentioned in the declaration.

The question for the opinion of the Court, was, whether the council of the said borough could, by virtue of the statute 5 & 6 W. 4, c. 76, legally order a borough rate, in the nature of a county rate, to be made within their borough, for the payment of the expenses which had before then been incurred, in carrying into effect the provisions of the said act. If the Court should be of opinion in the affirmative, a judgment of *nolle prosequi* was to be entered immediately, or otherwise, as the Court might think fit; but if the Court should be of a contrary opinion, then judgment was to be entered against the defendant, by confession, with 40*s.* damages.

*R. Alexander*, for the plaintiff, submitted that the rate was illegal. The question depends upon the construction which the Court will put on the 92nd section of the Municipal Corporation Act, 5 & 6 W. 4, c. 76, which enacts, "that in case the borough fund shall not be sufficient for the purposes aforesaid, the council of the borough is hereby authorized and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of this act; and in order to ~~raise~~ the amount so estimated, the said council is hereby authorized and required from time to time to order a borough rate in the nature of a county rate to be made within their borough;" and for that purpose the council of such borough, shall have

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within their borough, all the powers which justices of the peace have under the 55 Geo. 3, c. 5. The language used by the legislature is altogether prospective. They are to make an estimate; clearly in reference to what is to accrue. Justices would have no power to make a retrospective rate. In *Rex v. Justices of Flintshire* (a), this is established. So with respect to church-rates, *Rex v. Chapel-wardens of Haworth* (b); and gaol-rates, *Cortis v. Kent Water-Works' Company* (c).

The Court then called upon

*N. Clarke*, for the defendant.—It never could have been the intention that the act should be merely prospective in its operation. The words, it is submitted, mean this, viz., that as, at the time of the passing of the act, and in the interval between that time and the election of a council, numerous expenses must have been incurred, they are authorized, therefore, to make a rate for such expenses "to be incurred" after the passing of the act. It would have been impossible for them, in many instances, to calculate beforehand what amounts would be required. [Lord Abinger, C. B.—It must be equally difficult for county magistrates to calculate a county rate.] The case relied upon by my friend, *Rex v. Justices of Flintshire*, is not an authority in point. That was a rate for the purpose of *reimbursing* parties for debts already contracted. [*Alderson*, B.—It is a general rule, that you cannot charge a man for services of which he has not had the benefit. The services of the recorder, (for instance,) during the last year, are of no advantage to an inhabitant who comes to reside in the present year.] By the 93rd section, it is ordered, that accounts of the receipts and disbursements of the borough shall be kept, audited, and published. By this means, every inhabitant can have knowledge of his liability, and the burdens to which he is liable on coming into the borough. By the 36th section it is provided, that, at the first election of councillors after the passing of the act, the old mayor alone should act; and the 92nd section provides, that the expenses incurred at this election are to be defrayed out of the borough fund. Here was an expense necessarily incurred before the council were in existence; and, therefore, the rate for defraying it is necessarily retrospective. There is a distinction between the case where the council need not incur an expense before they have money in hand, and a case in which, as in that just put, where they must necessarily anticipate their funds. *The King v. Chapelwardens of Haworth* was decided upon this ground, as there the churchwardens ought not to have laid out any money until they had it actually in hand. The retrospective operation of a rate is only objected to where it is for the purpose of "reimbursing." If they have no authority to make a rate "retrospective," under the present circumstances, this inconvenience will follow, that the rate, in the first instance, must be excessive, in order to cover all contingencies.

LORD ABINGER, C. B.—Any real or imaginary inconvenience cannot alter our judgment in this case. If inconveniences were to influence our decision, then, as what is inconvenient in one borough might not happen to be so in

(a) 5 B. & Ald. 761.  
 (b) 12 East, 556.

(c) 7 B. & C. 314.

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another, the consequence would be, to introduce one law for *Stamford*, (for example,) and another for *Nottingham* or any other place. The legislature intended this act to be uniform in its operation, and as such we are bound to interpret it. If the words were not clearly all prospective, we might have been inclined to interfere, in order to remedy the present difficulty. Retrospective rates have long been discountenanced by courts of justice; the general rule being, that subsequent inhabitants shall not be made to bear the burden of remunerating services from which their predecessors have reaped all the advantage. Independently, however, of this rule against the allowance of a retrospective rate, the words of the statute are all prospective. These words are, "to be incurred from time to time." The council are directed to "estimate,"—a prospective operation; not to "calculate," which would be all that would be required in making a retrospective rate. We are called upon to read the words "to be incurred," as meaning, "which have been incurred." This we cannot do; and, therefore, I am of opinion that this rate is invalid.

BOLLAND, B.—I am of the same opinion. In the 92nd section, the legislature seems to me to have proceeded on the assumption that each borough had already funds in hand to meet the past expenses; and, if they have not, they are then directed how to act. When the town-council are elected, they are to estimate what will be sufficient to meet the coming expenses. If the clause should be otherwise interpreted, then any party will be enabled to remain in the borough until the end of the year, and just before the period appointed for making the rate; and, by then leaving it, will avoid the necessity of paying his proportion of the expense, and make a person coming in his stead pay for the entire of the past year.

ALDERSON, B.—I think the act intended the rate to be prospective, and not retrospective; and that it never was the object of the legislature to give the parties power to contract debts, and then raise the funds for defraying them. Where the council is obliged to impose the rate in the first instance, they are more likely to be economical; and this may have been in the mind of the legislature. Besides, what are the expenses? Salaries to the mayor and all other officers whom the council "shall appoint." Unless, therefore, the rate is prospective, the existing council may be empowered to impose large burdens, and leave to their successors the odium of raising the funds to pay them. In my opinion, therefore, the legislature have not authorized the rates to be raised prospectively, and in so doing have acted wisely.

Judgment for the plaintiff(a).

(a) Vide 7 W. 4 & 1 Vic. c. 81, s. 2, passed in consequence of this decision.



*Exchequer.*

## KENYON v. WAKES.

In assumpsit for wages, the plaintiff, in his particulars, claiming 15s. per week, gave credit for money paid. The defendant, contending that the plaintiff was only entitled to 7s. per week, gave the particulars in evidence, without a plea of payment, to shew that the balance alone was claimed by the plaintiff. The jury having found that the plaintiff's wages were only at the rate of 7s. per week, (thereby destroying the balance claimed,) gave a verdict for the defendant. Held, that the particulars were properly received in evidence as an admission of payment. Held, also, that, the defendant having omitted to object, at the trial, that payment, unless pleaded, could not be given in evidence in bar, but only in reduction of damages, the verdict ought not to be set aside (a).

**A**SSUMPSIT for wages. *Plea*—Non-assumpsit. At the trial, before Lord Abinger, C. B., at the *Middlesex* sittings after last *Hilary* Term, the plaintiff proved that he was in the service of the defendant from *April*, 1833, until *October*, 1836, and claimed payment at the rate of 15s. per week. The defendant, on the contrary, insisted that the terms of the hiring were 7s. per week; and, if so, that it appeared, from the plaintiff's own particulars, that all had been paid. The particulars were as follows:—

To money paid by the plaintiff for the defendant, and for money lent by plaintiff to defendant, at various times from <i>May</i> , 1833, to <i>September</i> , 1836.....	£11	18	8½
To wages, from <i>April</i> 22 to <i>September</i> 26, 1833, at 15s. per week .....	16	17	6
To wages, from <i>October</i> 1, 1833, to <i>October</i> 22, 1836, at 15s. per week .....	119	5	0
	148	1	2½
Payments on account .....	70	0	0
	£78	1	2½

Two objections were made at the trial; first, that if the defendant resorted to the particulars at all, he ought to have taken the whole together, in which case they shewed a balance against him; and, secondly, that they could not be used for the purpose of shewing a payment, there being no plea of payment on the record. His lordship, however, admitted the evidence; and the jury having found that the plaintiff's wages were only 7s. per week, which removed the balance of 78*l.* 1*s.* 2½*d.*, a verdict passed for the defendant.

*Humphrey* having obtained a rule for a new trial,

*Thesiger* shewed cause.—The particulars admit a payment of 70*l.*; and the plaintiff, therefore, substantially proceeds for the balance of 78*l.* odd. The admission is equivalent to a plea of payment. The case of *Booth v. Howard* (b) does not apply to the present. That case merely decided, that the particulars were not to be taken as incorporated with the declaration, so as to form a part of it. Mr. Justice *Patteson*, in giving judgment, there says, "The particulars are for the benefit of the defendant; and although the defendant might have pleaded, as to the 8*l.* 8*s.* 6*d.*, the general issue, and, as to the residue of the demand, payment of the 5*l.* into court; and would, I think, have taken a better course if she had so pleaded; yet I am not prepared to say that she was bound to do so." [Lord *Abinger*, C. B.—The particulars shew that the balance was all that was in dispute between the parties.] Precisely so; and the finding of

(a) Vide New Rule of Court at the end of the case.

(b) 5 D. P. C. 438.

the jury negatived the fact of any such balance having been due. The verdict, therefore, was right.

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*Platt and Humfrey, contra.*—It is apprehended that the rule is clearly established, that the particulars cannot be incorporated with the declaration. The case of *Ernest v. Browne* (c) decides, that, notwithstanding an admission of payment in the particulars, it must be pleaded. [*Parke, B.*—Suppose there is a plea of payment on the record, to which the plaintiff enters a *nolle prosequi*; how will he avoid the costs of the *nolle prosequi*, without an admission of payment in the particulars?] By not going for it in his declaration. In practice, this is done frequently; the declaration, admitting the payment on account, goes only for the balance; and it may have originated with a view to avoid the present difficulty. [*Lord Abinger, C. B.*—What would non-assumpsit apply to in such a case?] The promise to pay the balance. At all events, as there is no plea of payment on the record, the defendant can only use the particulars in reduction of damages, and not as a bar to the action.

*LORD ABINGER, C. B.*—I think there is no occasion to settle the point last adverted to, as it was not made at the trial. The bill of particulars shews that the plaintiff only claimed a balance, and the finding of the jury has destroyed that balance.

*PARKE, B.*—I think the rule ought to be discharged, as the point whether the plaintiff was not, at all events, entitled to a verdict, with nominal damages, was not taken at the trial. If that point had been raised, we should have had to determine whether a payment admitted by the particulars must be pleaded (d). Before *Ernest v. Browne*, I was of opinion that it need not be pleaded. In *Coates v. Stevens* (e), I am reported to have expressed such an opinion. I thought the particulars were given as a guide to the defendant what he ought to plead to, and also for the purpose of limiting the plaintiff's proof. It is said, that, in *Ernest v. Browne*, a distinction is taken between debt and assumpsit. I cannot understand the distinction; and I am not yet satisfied that my opinion in *Coates v. Stevens* was wrong. As to the necessity of the jury taking all the particulars together, it is every day's practice to leave to a jury the credit which shall be attached to the statement of a party in his own favour, and they may believe one part, and disbelieve the other.

Rule discharged (f).

(c) 3 Bing. N. C. 674.

(d) Vide *Nicoll v. Williams*, supra, p. 220, decided after the present case.

(e) 2 C., M., & R., 118.

(f) By a Rule of Trinity Term, 1 Vic., it is laid down, that, "In any case in which the plaintiff, (in order to avoid the expense of a plea of payment, shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, it shall not be necessary for the defendant to plead

the payment of such sum or sums of money.

"But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance, without giving credit for any particular sum or sums."

And that "Payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt; but shall be pleaded in bar."

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## CHAPPELL v. POLES and others.

Where a party paid money to parish officers to exonerate him from the expenses of his bastard child, and the child died during the year they continued in office, held, that an action for money had and received might be maintained against those parish officers to recover the money not expended on the child, although they had quit- ted office, and handed over the money to their suc- cessors.

**A**SSUMPSIT for money had and received to the use of the plaintiff. *Pleas*, non-assumpsit, and a set-off as to 5*l.* 2*s.* which was admitted.

At the trial, before *Williams, J.*, at the last spring assizes for the county of *Somerset*, it appeared that the action was brought by the plaintiff, who was the father of an illegitimate child, against the defendants, who were the church- wardens and overseers of the parish in which the child was born, to recover the sum of 30*l.*, paid by him for the maintenance of the child. The child was born in *April*, 1832, during which year the defendants were in office. At the time the money was paid by the plaintiff, the defendants gave a receipt stating it to have been received "to exonerate him from all and every liability that might occur from a certain base child, and sworn to him by *Charlotte Benning*." The child died on the 26th *January*, 1833. The defendants went out of office at *Easter*, 1833, at which time there was a balance of the parish money in their hands, amounting to 116*l.* 12*s.*, including the 30*l.* received from the plaintiff; and this balance they handed over to their successors. The jury found a verdict for the plaintiff for 24*l.* 18*s.* The learned judge having given leave to move to enter a nonsuit,

*Erle*, in *Easter* term, obtained a rule accordingly.

*Sir W. Follett*, and *Halcomb*, shewed cause. The child having died while the defendants were in office, the balance in their hands became money had and received to the plaintiff's use. But, at all events, since the new rules, the defence, that they have paid over the money to their successors, ought to have been specially pleaded. When the rule was moved for, the Court appeared to think *The King v. Martin* (a) inconsistent with the other cases. In *Cole v. Gower* (b), it was held that the 6 Geo. 2, c. 31, only authorized parish officers to take security from the putative father to indemnify the parish; and, therefore, where they had taken a promissory note, absolute, for a sum cer- tain, to which there was a plea of a tender of a lesser sum, as the amount of the damage actually sustained by the parish, which tender was found for the defendant, it was held that the plaintiffs could not recover further upon the note. *Townson v. Wilson* (c) is also in point. In *Staniforth v. Staggs*, which is mentioned in a note to the latter case, the objection was taken, that the parties being in *pari delicto*, the money could not be recovered back; but *Law- rence, J.*, says, "There is no *delictum*; the money was paid upon a supposed consideration, which cannot be effected, and therefore may be recovered back, as money had and received to the plaintiff's use." *Fernall v. Horne* (d) is to the same effect. *The King v. Martin* (e) is relied upon by the other side, but there it did not appear that the child was still alive. In *Clark v. Johnson* (f), it was held that the mother of an illegitimate child might recover in an action for money had and received, money deposited with the parish officers to meet

(a) 2 Campb. 268.

(b) 6 East, 110.

(c) 1 Campb. 396.

(d) 1 Campb. 564.

(e) 2 Campb. 268.

(f) 3 Bing. 424.

any charges to which the parish might be liable in respect of the child. In that case, also, the child was still alive. Here, the moment the child died, the plaintiff was entitled to recover the money, [Parke, B.—If this were a question on the Statute of Limitations, you would contend that the statute would begin to run from the time the money was paid, and not from the death of the child.]—They also cited *Gilbert v. Sykes* (g), and *The Overseers of St. Martin v. Warren* (h).

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*Erle*, in support of the rule.—This was an illegal contract in its inception. Besides, the money is no longer in the hands of the defendant. [Parke, B.—If the money was ever received by the defendants to the plaintiff's use, and if the fact of their having received it was illegal, they ought to have pleaded that they have paid it over.] In *Howson v. Hancock* (i), it was held, that where money deposited upon an illegal wager had been paid over to the winner, by the consent of the loser, the latter cannot afterwards maintain an action against the former to recover back the deposit. In *Hastelow v. Jackson* (k), the plaintiff had prohibited the stakeholder from paying over the stakes, and on that ground it was held, that he was entitled to recover back his own deposit. Here the money was not paid to the defendants for their own benefit, but the moment they received it, it was carried by them to the parish accounts, and there was no specific fund in their hands. None of the authorities cited on the other side bear upon the case, except *Townson v. Wilson*, and that is inconsistent with *The King v. Martin*. From the latter case, it appears, the defendants would have been indictable, if they had not brought into the parish accounts the money received.

LORD ABINGER, C. B.—If we adhere to the principle of the decided cases, I think we must consider this point as settled, and that the plaintiff is entitled to recover. *The King v. Martin* is in one respect distinguishable, as, under the circumstances of that case, the party was bound to pay over a portion of the money. Lord *Ellenborough* had before decided that such a contract was illegal, and that the money might be recovered back; and I am disposed to refer that part of his judgment in *The King v. Martin*, in which he speaks of the officer being liable to an indictment, to such a portion of the money as he was bound to pay over. Here the contract with the officers, if really intended as an indemnity, was not what the law warranted. But if we were to consider the contract lawful, as a mere indemnity to the parish officers, but still not exonerating the putative father, the death of the child left the other money in their hands, which ought to have been repaid to the father, the object of the payment by him being exhausted. Even in the narrowest construction of the case, he is entitled to recover the money not expended: but the better way is to put it upon the broader ground, and then, from the decided cases, it is clear the money was paid upon an unlawful consideration.

PARKE, B.—I am of the same opinion. Mr. *Erle* admits that it is now too late to consider that an action for money had and received will not, in some cases, lie. The case of *Clark v. Johnson* decided, not only that the security is

(g) 16 East. 157.  
(h) 1 B. & A. 491.

(i) 8 T. R. 575.  
(k) 8 B. & C. 221.

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void, but that the money paid to the parish officers upon a contract to indemnify, is illegal, and may be recovered back, the parties not being considered as standing *in pari delicto*, for in that case it could not be recovered back. Mr. Justice *Lawrence* first decided that the putative father was not in the same condition; that is, in case of a contract where money is paid to the parish officers, and there is an engagement with them to indemnify the putative father, the money may be recovered back. The Statute of Limitations would begin to run from the time the money was paid to the parish officers; for, from that period, the plaintiff would have a right of action against them. The Court of Common Pleas has gone the length of saying, that the parish has no right to take any indemnity, except that which is in accordance with the statute. But, assuming this to be a legal contract, and that the money was deposited in the hands of the defendants, as an indemnity to them, even in that point of view the plaintiff would be entitled to recover, and at the death of the child an action for money had and received might be maintained. There could not be that implicit understanding relied upon by Mr *Erle*, that the money should be paid over to their successors; because, the only ground upon which it could be presumed, would be, that the child continued chargeable to the parish; but, if the child dies, during the continuance in office of those who received the money, there could be no implied direction to pay it over. Then there is the express authority of Lord *Ellenborough* in *Townson v. Wilson*, upon the principal point. But the real view of the case is, that the contract was, from the very beginning, illegal and void, and that the money was received to the plaintiff's use; and, therefore, the present action is properly brought.

BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

TIMMIS and another, Executrix and Executor of RICHARD  
 TIMMIS, deceased, v. PLATT.

Non-assumpsit  
 is a good plea  
 to an action by  
 an executor,  
 on a bill or  
 note, where  
 the promise is  
 laid to the ex-  
 ecutor.

THE declaration stated that the defendant, on the 11th *March*, 1815, in the life-time of *Richard Timmis*, made his promissory note, in writing, and thereby promised to pay him 100*l.*; that the said sum being due and unpaid, the defendant afterwards, and after the death of the said *Richard Timmis*, to wit, on the 14th *April*, 1831, promised the plaintiffs, as executrix and executor as aforesaid, to pay them the amount of the said note. *Plea*, as to the said supposed promise alleged to have been made to the said plaintiffs, that defendant did not promise, *modo et forma*. *Demurrer*, assigning for cause, that the plea of non-assumpsit is inadmissible in an action on a promissory note.

*R. V. Richards*, in support of the demurrer.—By the rule of H. T. 4 W. 4, (Assumpsit, E.) the plea of non-assumpsit is inadmissible in all actions on bills of exchange and promissory notes. [*Parke*, B.—The defendant means to deny the promise to pay the executor. How is he to raise the question whether you mean to take the case out of the Statute of Limitations? The effect of this plea is to admit there was such a note, but to deny the promise

to the executor.] The promise to the executor is raised by inference of law : this is, in fact, an action upon the note ; and the plea of non-assumpsit is inadmissible. [*Purke*, B.—It is not an action on the note, in the sense of that rule : it is an action on the subsequent promise.] If there is proof of a note in favour of the testator, the law implies a promise to pay the executors. [*Parke*, B.—In this case the action is brought on an express promise to the executors. *Alderson*, B.—The action is not brought on the promise contained in the note, and that is the meaning of the rule. The defendant, in fact, admits that the testator made the note, but denies that he promised to pay the executor.] Suppose the case of a note barred by the Statute of Limitations, and a subsequent promise to take it out of the statute, could the defendant plead non-assumpsit? [*Purke*, B.—There nothing would appear upon the record, to shew that the plaintiff was bound to prove any thing more than the promise contained in the note itself.] Then suppose the plaintiff stated, in his declaration, that the debt was barred, and alleged a subsequent promise to pay? [*Parke*, B.—I am not sure, in such a case, that non-assumpsit might not be a good plea.]

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Leave to amend on payment of costs.

*Wightman* appeared for the defendants.

#### CAPEL v. STAINES.

*DAVISON* moved for a rule to shew cause why the Master should not review his taxation, and allow the plaintiff or his attorney the costs of letters written to the defendant, and the postages of letters received from him before the commencement of the action. The cause had proceeded as far as the declaration, when an order was made, by consent, that all proceedings be stayed upon payment of debt and costs, to be taxed by the master. The defendant had most earnestly requested that time should be given, and every accommodation and indulgence were shewn by the plaintiff's attorney. In the course of the correspondence, the plaintiff's attorney had written fifteen letters to the defendant, and had paid the postage of thirteen letters received from the defendant.

An attorney is not entitled, on taxation, to the costs of more than one letter before action brought.

*LORD ABINGER*, C. B.—The usual practice has been to allow for one letter only before action brought, and if it were departed from, it might lead to great inconvenience.

*PARKE*, B.—It is much better to abide by the general rule. If this application were allowed, the next attempt would be to introduce a letter every day.

Rule refused.

*Exchequer.*

## FOULKES v. BURGESS.

Where the plaintiff declared against a prisoner in *Hilary* Term, and the cause was tried in the following vacation, *held*, that, by Rule H. T. W. 4, s. 85, the plaintiff should have charged the defendant in execution in *Easter* Term.

THE plaintiff declared against the defendant, a prisoner, in *Hilary* Term last.

The cause was tried at the assizes, on the 31st *March*, when the plaintiff obtained a verdict, and signed final judgment in *Easter* Term following, but did not charge the defendant in execution.

*R. V. Richards* moved for a rule to shew cause why the defendant should not be discharged out of custody, on the ground that he was supersedable. The 85th section of the Rule H. T. 2 W. 4, provides "that the plaintiff shall proceed to trial on final judgment against a prisoner, within three terms, inclusive, after declaration, and shall cause the defendant to be charged in execution within two terms inclusive after such trial or judgment, of which the term in or after which the trial was had shall be reckoned one."

*Barstow* shewed cause.—It must be admitted that the latter part of the rule, if strictly construed, would warrant the application, but, if taken in connection with the former part, they would in all cases have three terms in which to proceed to final judgment. He is also entitled to three terms before he proceeds to trial; but in that case the term in or after which the trial was had, must be reckoned as one for the purpose of charging the defendant in execution.

GURNEY, B., referred to the case of *Borer v. Baker* (a), in which it was held, that if the trial takes place in vacation, and the defendant surrenders after it and before the following term, he ought to be charged in execution in that term.

ALDERSON, B.—Unless the words of the latter part of the rule have no meaning, the plaintiff should have charged the defendant in execution some time in *Easter* Term.

Rule absolute.

(a) 1 A. & E. 860. 2 Dow. P. C. 608.

## WARNE v. BERESFORD.

To debt for goods sold and delivered, the defendant pleaded the Westminster Court of Requests' Act, (23 Geo. 2, c. xxvii.) averring that he was not indebted to the plaintiff in the sum of 40s. Replication, that defendant was indebted in a larger sum than 40s.; upon which issue was joined, and a verdict found for the defendant. After plea, the 23 Geo. 2. was repealed by the 6 & 7 W. 4, c. cxxxvii. Held, that the plaintiff was entitled to judgment, *non obstante veredicto*.

DEBT for goods sold and delivered. The defendant pleaded the Westminster Court of Requests' Act, (23 Geo. 2, c. xxvii.) averring that, at the time of the commencement of the action, he was not indebted to the plaintiff in any sum of money amounting to forty shillings. The plaintiff replied that the defendant was indebted in a larger sum than forty shillings, upon which

Geo. 2, c. xxvii.) averring that he was not indebted to the plaintiff in the sum of 40s. Replication, that defendant was indebted in a larger sum than 40s.; upon which issue was joined, and a verdict found for the defendant. After plea, the 23 Geo. 2. was repealed by the 6 & 7 W. 4, c. cxxxvii. Held, that the plaintiff was entitled to judgment, *non obstante veredicto*.

issue was joined and a verdict found for the defendant. After plea pleaded, and before trial, the 23 Geo. 2, c. xxvii. was repealed by the 6 & 7 W. 4, c. xxxvii., and the sum of five pounds was substituted for the former sum of forty shillings, no provision being made respecting actions then pending. A rule having been obtained, by *Wightman*, to enter up judgment for the plaintiff, *non obstante veredicto*,

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*Payne* shewed cause.—The plea tendered a material issue at the time it was pleaded, and cannot be rendered bad by a subsequent repeal of the statute upon which it was framed. There is no distinction between the case of a repealed statute, which is intended to afford a *protection* to a party, and of one which operates in the nature of a penalty. In *Charrington v. Meatheringham* (a), a statute which gave treble costs on nonsuit to parties sued for any thing done in pursuance of that act, was repealed by a statute which gave, in such case, costs only as between attorney and client. The nonsuit took place before the repealing statute came into operation, but judgment was not signed until after; and there it was held that the Court had no power to award treble costs, Lord Abinger, C. B., observing, “that the costs were in the nature of a penalty, and although it might be true that a party retained his right to the protection afforded him by the repealed statute, it did not follow the same principle extended to a penalty.” It is for the same reason that a party is not allowed to enter a suggestion upon a statute which has been repealed. Here the defendant seeks the protection of the act.

ALDERSON, B.—The issue raised upon the record is as to the amount only; it is in the nature of a suggestion, and brings the case within those already decided. But, I apprehend, the real question is, upon the facts found on this record, what must be the judgment of the Court, according to the law now in existence. The rule must be absolute.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

(a) 2 M. & W. 228. 5 Dow. P. C. 564.

### SMITH v. BROWN.

CASE. The declaration alleged, that the defendant was a carrier from *Birmingham* to *Bristol*, and that the plaintiff had delivered certain casks to the defendant, at *Birmingham*, to be by them carried and conveyed, from *Birmingham* aforesaid to *Bristol* aforesaid, and there delivered to the plaintiff, for a certain hire and reward therefore payable by the plaintiff to the defendant in that behalf. It then alleged, as a breach, that although the time for the delivery of the said casks had long since elapsed, yet the defendant so carelessly behaved and conducted himself in that behalf, that by and through his carelessness, negligence, and improper conduct, the said casks were not delivered to the plaintiff, at *Bristol* or elsewhere. *Pleas*—first, not guilty; secondly, that although true it is, that the said casks were delivered to the defendant, being such carrier, to be by him conveyed from *Birmingham* to *Bristol*, yet the

Where an action of tort was tried, by consent, before the under-sheriff, and a verdict found for the plaintiff on one issue, and for the defendant on another; held, that no judgment could be given, as the trial was altogether a nullity.



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same were not delivered to the defendant to be by him delivered to the plaintiff at *Bristol, modo et forma*. The cause was tried, by consent, before the under-sheriff of *Bristol*, on the 17th *April* last, when the jury found a verdict for the plaintiff, on the first issue, with 12*l.* 7*s.* 5*d.* damages; and for the defendant on the second issue. The under-sheriff delivered the *postea* to the plaintiff, who signed judgment for the damages.

*Addison* obtained a rule to shew cause why the judgment should not be set aside for irregularity, with costs, and why the master should not deliver up the *postea* to the defendant, on the ground that he had obtained a verdict on the second plea, which went to the whole cause of action.

*Ball* shewed cause, and objected that the Court had no power to order the *postea* to be delivered to the defendant. The 3 & 4 *W.* 4, c. 42, (the Writ of Trial Act,) did not apply to cases of tort, but only to debts and pecuniary demands; consequently the sheriff had no jurisdiction to try the cause. *Watson v. Abbott (a)*.

*Addison*, in support of the rule.—Upon the whole record, the defendant is entitled to the *postea*. *Vivian v. Blake (b)*. Then as to the objection that the sheriff had no authority to try the cause, it is now too late to take advantage of it, as the cause was tried on the 17th of *April* last.

LORD ABINGER, C. B.—As the record now stands, the defendant might have a writ of error. In point of fact, neither party is entitled to sign judgment; it is an informal record, and no judgment can be given. The sheriff had no power to try this particular case; the act of parliament does not extend to it. The judgment is a perfect nullity; but I see no reason for encouraging a writ of error, by delivering the *postea* to the defendant. The rule must be absolute for setting aside the judgment, and discharged as to the other part.

ALDERSON, B.—It is quite clear the judgment ought to be set aside. Both parties have been guilty of an illegal act, in taking the case before a tribunal which was incompetent to try it.

Rule accordingly.

(a) 2 *Dow. P. C.* 215. 2 *C. & M.* 150.

(b) 11 *East*, 263.

### DAWES v. ANSTRUTHER.

In an action by indorsee against acceptor of two bills of exchange for 250*l.* each, the declaration contained two counts on the bills only. The plaintiff arrested the defendant for 240*l.*, and on the capias was an indorsement that the plaintiff claimed 260*l.* 6*s.* 4*d.* for debt. The particulars state the action to be brought to recover 500*l.* due upon the bills set forth in the declaration.—*Held*, that the defendant was entitled to further and better particulars of the plaintiff's demand, *Alderson, B., dissentiente*.

ASSUMPSIT on two bills of exchange for 250*l.* each, dated 1st *June*, 1830, drawn by one *W. Gordon* upon, and accepted by, the defendant, payable, six months after date, to the drawer or his order, and by him indorsed to the plaintiff. The capias upon which the defendant was arrested was indorsed for bail for 240*l.* and upwards; it had also the following indorsement:—"The

counts on the bills only. The plaintiff arrested the defendant for 240*l.*, and on the capias was an indorsement that the plaintiff claimed 260*l.* 6*s.* 4*d.* for debt. The particulars state the action to be brought to recover 500*l.* due upon the bills set forth in the declaration.—*Held*, that the defendant was entitled to further and better particulars of the plaintiff's demand, *Alderson, B., dissentiente*.

plaintiff claims 260*l.* 6*s.* 4*d.*, with interest thereon from the 30th *December*, 1830, to the day of payment, for debt; and 3*l.* 10*s.* for costs; and if the amount thereof is paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed." 260*l.* was paid into court in lieu of bail. The declaration contained two counts, one upon each bill; and the particulars of demand were as follows:—"This action is brought to recover the sum of 500*l.*, due from the defendant to the plaintiff on the several bills of exchange set forth in the first and last counts of the declaration, and also interest thereon from the 4th *December*, 1830, to the day of payment." A summons was afterwards taken out before *Gurney*, B., for further and better account, in writing, of the particulars of the plaintiff's demand, with dates; and the learned judge made an order accordingly.

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*Ogle* having obtained a rule *nisi* to rescind this order, upon an affidavit of *Gordon*, the drawer, which stated, that the bills were accepted by the defendant for a good and valuable consideration; and that, before the bills became due, he duly indorsed them to the plaintiff as a collateral security for goods sold and delivered by the plaintiff to him, and upon an express agreement that the plaintiff should account to him for all money recovered upon the bills beyond what should appear to be due from him to the plaintiff; that money, equal to the amount of the said two bills, with interest thereon, is still due and owing from the defendant to the drawer.

*Thesiger* shewed cause.—Under the circumstances of this case, the learned judge has properly exercised his discretion in ordering further and better particulars. [Lord *Abinger*, C. B.—The general rule is, that particulars are not necessary in actions upon bills of exchange.] In *Brooks v. Farlar* (a), it appeared, from the defendant's affidavit, that he was acquainted with the whole of the plaintiff's case; and *Tindal*, C. J., there says, "On a single count for a bill of exchange, the defendant is not entitled to any particulars, unless he makes out a strong case of exception. No such case is made out on these affidavits, from which it appears, that, within a few shillings, the parties are acquainted with each other's case." But here the defendant has not the least notion what the plaintiff is going for. [*Alderson*, B.—You want a bill of discovery, and had better go into a court of equity for that. It is not common to require any thing more than the amount.] The plaintiff arrests the defendant for 240*l.*, and claims, on the writ, 260*l.*; and, by his particular, states that he seeks to recover 500*l.*; so that it is impossible to know for what he is going.

*Ogle*, in support of the rule.—The particulars state every thing the defendant can require. There are two counts in the declaration, one on each bill, and in which the dates of the bills already appear. Though the indorsement on the writ is for 240*l.* only, the plaintiff has a right to claim, at the trial, the full amount of the two bills.

LORD ABINGER, C. B.—Suppose this had been an action by *Gordon* himself, and the defendant had made an application for further particulars, upon an affidavit, stating that the bills were given to *Gordon* under an agreement that

(a) 3 Bing. N. C. 291.

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he should pay some debt of the defendants; if *Gordon* does not deny that, the bills become a mere security for money paid; and although, in point of law, in an action on the bills, he might sue for the whole amount, yet, in truth, he has no right, except to the amount he has paid; and the defendant has a right to know what amount he really claims. *Ex concessis*, these bills were given, not for a debt, but as a security for money advanced, I should think this is a case in which particulars ought to be given, it appearing, from the plaintiff's affidavit, that he is only entitled to 240*l.* I am not aware that we may not do justice in this court in a summary way, instead of compelling a party to file a bill of discovery.

**ALDERSON, B.**—A bill of particulars is simply this: where the declaration is so general that you cannot, upon the face of it, ascertain what the plaintiff goes for, then the defendant has a right to call upon the plaintiff for a statement of his demand; but I have always understood, so long as I have been acquainted with the law, that where there is a special count, the defendant cannot require particulars, inasmuch as the particular is the declaration itself. I find it laid down in all the books of practice, that it is a universal rule that particulars of the plaintiff's demand are never required in actions on bills of exchange or promissory notes. This may be a case in which the plaintiff may not be ultimately entitled to recover the amount for which he is suing; but that is no reason why he should be obliged to state, in his particular, that he only goes for 240*l.* It may be an unconscientious thing to demand this 500*l.*; but can any person doubt, if he sees a count upon one bill of exchange for 250*l.*, and a count upon another bill of exchange for 250*l.*, and a particular that the plaintiff goes for the amount of the bills in these counts—could any person doubt the distinctness of the demand? Whether conscientious or not, is another question.

**BOLLAND, B.**—So far I agree with my brother *Alderson*, that, in actions on bills or exchange, there must be some clear and specific ground for asking for better particulars; and I am not aware, except in one instance, that I ever made such an order. But, in the present case, if the application had been made to me, I should have called upon the plaintiff to square his demand by what he originally indorsed upon the writ, viz., 240*l.* and upwards. If the holder of these bills had a claim for 500*l.*, it is extraordinary that he should moderate his claim to 240*l.* The presumption is, that the indorsee would claim the whole amount which he could prove at the trial. The ground upon which I agree with the lord chief baron is this, that the plaintiff has confined himself to a claim of 240*l.* by arresting for that amount only; if he had not done so, he would have been left to a court of equity and a bill of discovery. It appears, from the plaintiff's affidavit, that *Gordon* put the bills into his hands as a security; and I think, therefore, that the plaintiff is bound to go further, and shew for what amount he is suing.

**GURNEY, B.**—I never in any other case made an order for better particulars in an action on a bill of exchange; but, under the circumstances, I thought it was not unreasonable to call upon the plaintiff to state more.

Rule discharged.

## JOHNSON and others v. DODGSON.

*Exchequer.*

**A**SSUMPSIT for goods sold and delivered, and on an account stated. *Plea*—Non-assumpsit. At the trial, before Lord *Abinger*, C. B., at the *London* sittings after *Hilary* Term, it appeared that the action was brought to recover the price of thirty-one pockets of *Sussex* hops, sold by the plaintiffs to the defendants who was a hop-merchant at *Leeds*.

On the 19th *October*, one *Morse*, the plaintiffs' traveller, called on the defendant at *Leeds* with some samples of hops, and agreed with him for the sale of the hops in question. He then signed the following entry, written by the defendant in a book of his own, and which he kept in his possession.

“ *Leeds*, 19th *October*, 1836.

“ Sold *John Dodgson*,

27 pockets *Playsted*, 1836, *Sussex*, at 103*s*,

The bulk to answer the sample.

4 pockets *Selmes*, *Bekley's*, at 95*s*.

Samples and invoice to be sent per *Rockingham* Coach.

Payment in banker's at two months.

“ Signed for *Johnson, Johnson*, and Co.

“ *D. Morse*.”

*Morse* afterwards made a similar entry in a book of his own. On the same evening the defendant wrote the plaintiffs the following letter:—

“ *Leeds*, *Wednesday evening*, 19th *October*, 1836.

“ Gentlemen,

“ Please to deliver the twenty-seven pockets, *Playsted*, and the four pockets, *Selmes*, 1836, *Sussex*, to Mr. *Robert Pearson* or bearer, to be carted to *Stanton's* wharf: twenty pockets of *Playsted* to be forwarded per first ship, and the remaining eleven pockets per the second ship, and you will oblige, Gentlemen,

“ Your most obedient,

“ *John Dodgson*.”

Bulk samples were sent pursuant to the contract, but were returned by the defendant as not answering the samples by which he bought from *Morse*. There was conflicting evidence as to whether or no inferior samples had not been substituted, and the jury found that question in favour of the plaintiff. On the part of the defendant it was objected, that there was no sufficient memorandum in writing to satisfy the Statute of Frauds, the entry in the defendant's book not being signed by him, and his subsequent letter not expressly referring to that entry. The learned judge having reserved leave to move to enter a nonsuit,

*Cresswell*, in *Easter* Term, obtained a rule accordingly; against which,

*Thesiger*, (with whom were *Erle* and *Evans*,) now shewed cause.—The entry in the defendant's book having been made by himself, and signed by the plain-

The plaintiffs' agent agreed with the defendant for the sale of certain hops, when the defendant made an entry in a book of his own, commencing “Sold *John Dodgson*, &c.” This entry was signed by the plaintiffs' agent at the defendant's request. *Held*, a sufficient memorandum in writing to satisfy the Statute of Frauds.

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tiffs' agent, is sufficient to satisfy the requisites of the statute. In *Saunderson v. Jackson* (a), a bill of parcels, in which the vendor's name was printed, delivered to the vendee at the time of an order given for the future delivery of goods, was considered a sufficient memorandum of a contract within the statute. So in *Schneider v. Norris* (b), a bill of parcels, in which the name of the vendor was printed, and that of the vendee written by the vendor, was held sufficient. But at all events the subsequent letter may be referred to the memorandum, and then there can be no doubt that, taken together, they would constitute a sufficient note of the contract. In *Allen v. Bennett* (c) it was held, that an order for goods written and signed by the seller in the book of the buyer, but not naming the buyer, might be connected with a letter from the seller to his agent mentioning the name of the buyer, and with a letter from the buyer to the seller claiming the performance of the order, so as to make a complete contract within the statute. In *Jackson v. Lowe* (d) the purchaser of flour gave a notice in writing to the seller, who had delivered part of it, that it was of a bad quality and unsaleable, and required him to take it away, and in which notice the quantity, quality, and price, and time of delivery were stated: the attorney for the vendor answered the notice, stating that the latter had performed his contract so far as it had gone, and was ready to complete the remainder, and these two documents were considered a sufficient memorandum in writing of the contract. [*Parke, B.*—There the seller's letter distinctly refers to the buyer's.] But there is a further question as to whether there has not been an acceptance of the goods by the defendant. The jury have found that the bulk answered the samples, therefore the delivery of the bulk samples to the carrier, would be a complete delivery of the hops. [*Parke, B.*—The defendant expressly says that he will not accept. The delivery to the carrier may be a delivery to the defendant, but an acceptance by the carrier is not an acceptance by him. The old cases in which it was said that a receipt by a carrier was an acceptance to satisfy the statute, were overruled by *Howe v. Palmer* (e) and *Hanson v. Armitage* (f). Lord Abinger, C. B.—If, to take the strongest case, the purchaser had sent his servant for the goods, and when they arrived, he sent them back as not answering the samples, he could not be said to accept them.]

Lastly, this is an objection which ought to have been pleaded. The 17th section of the Statute of Frauds makes void all contracts for the sale of goods, for 10*l.* or upwards, unless there be some note or memorandum of the contract in writing. The rule of court expressly directs that all matters which shew the transaction to be void or voidable in law, shall be specially pleaded. In the case of *Barnett v. Glossop* (g), a similar question was decided. [*Parke, B.*—In an action for an estate bargained and sold, might not the defendant, under the general issue, shew that there had been no conveyance? Lord Abinger, C. B.—When, by law, you cannot make a particular contract, except in writing, to deny the writing is to deny the contract.]

*Cresswell* and *Wightman*, in support of the rule.—The entry in the defendant's book was not of itself a sufficient memorandum of the contract. In all

(a) 2 B & B. 238; 3 Esp. 180.

(b) 2 M. & S. 286.

(c) 3 Taunt. 169.

(d) 7 Moore, 219; 1 Bing. 9.

(e) 3 B. & A. 321.

(f) 5 B. & A. 559.

(g) 1 Bing. N. C. 633; 1 Scott, 621.

the cases in which the party has been held to be charged by any such entry, he has introduced his own signature as binding himself. Thus, if he write—"I, A. B., agree, &c, that—" that might be sufficient to bind him. The authorities cited on the other side, are cases of documents which the party charged had delivered over to the other party. Here the memorandum is signed by the plaintiff's agent, for their protection, and not by the defendant as a party to be charged. There is nothing on the face of the document to shew that the defendant has bought, but it only appears that *Morse*, on behalf of his employers, has sold. If the defendant had simply made a memorandum in his own book that on such a day the plaintiff sold, could that be considered sufficient. [*Parke, B.*—Yes, if he meant it to be a memorandum of the contract, but not so, if he merely meant it to be a memorandum to be kept by himself.] This case resembles the taking of a sold note, without the exchange of a counter-bought note.

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Secondly, the defendant's letter does not refer to this particular contract. *Allen v. Bennett* decided that an order could not be assumed to be the purchaser's order, though it was entered in his book. If the letter had said "the hops for which I bargained with your traveller to-day," there would have been a distinct reference to the particular contract, but as it is, the letter has no reference to any price, or time for delivery, or period of payment. To shew that there was only one such contract it would be necessary to introduce parol evidence. [*Lord Abinger, C. B.*—The statute does not altogether exclude parol evidence, but only requires a note in writing of the contract, in order to prevent fraud or mistake as to its terms.] Suppose the letter was merely in these terms, "please to deliver the hops to A. B.," parol evidence, if admissible here, might be received in that case also. It would be impossible to draw any line as to what might or might not be supplied by parol evidence. Unless the subsequent document refers in specific terms to the former one, it cannot be part of it, so as to constitute a sufficient note in writing to satisfy the statute.

Lord ABINGER, C. B.—It appears to me that this is a very clear case. If it had rested solely on the question as to whether or no the letter sufficiently referred to the memorandum, there might, perhaps, have been some doubt, though I myself should have thought that reference to the only contract proved in the case, would have been sufficient. But on the other point it seems to me one of the strongest cases that have occurred. The Statute of Frauds requires, that there should be a note or memorandum of the contract in writing, signed by the party to be charged, and the cases have decided that it is immaterial on what part of the instrument the signature is; whether it is in the beginning or middle it is as binding as if at the foot of it, it being a question for the jury whether the party not having signed it at the foot meant to be bound, or whether he had left it so unsigned, because he had refused to complete the contract. But when it is ascertained that he meant to be bound by it, the statute is satisfied, there being a note in writing, shewing the terms of the contract, and recognized by him. In the present case I think the requisites of the statute are fully complied with. There is a memorandum in writing containing all the terms of the contract, it is in the defendant's own hand-writing containing his name, and it is signed by the plaintiffs through their agent.

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*Judgments*  
*Procedura*

**FALLER B.**—I am of the same opinion, and think this was a sufficient memorandum in writing. The point is in effect decided by the cases of *Sears v. Jackson* and *Schwartz v. Morris*. The entry was written by the defendant himself and required by him to be signed by the plaintiffs' agent. That is sufficient to show that he meant it to be a memorandum of contract between the parties. If the question turned upon the recognition by the subsequent letter. I own I should have had very considerable doubt, whether it related sufficiently to the contract. But it is unnecessary to give any opinion upon that point, because it seems to me there was a sufficient note in writing.

**SIGGARD B.**—I am also of opinion that the entry made by the defendant was a sufficient memorandum in writing, and if it were necessary to decide the other point, I should be inclined to think that the letter sufficiently related to the contract.

Rule discharged,

### FALLER P. WARD.

When goods were sent to be paid for by a bill at two months, held, that it is an action for goods sold and delivered, brought after the time when such bill would have become due, the jury were properly directed to allow the interest which would have been payable on the bill, as part of the price of the goods.

**THIS** was an action for goods and cattle sold and delivered, tried before Gurney, B., at the last summer assizes for Carmarthen.

**Plea**—That the defendant had given plaintiff a bill of exchange for the amount, which the plaintiff had accepted in satisfaction, and issue thereupon.

It appeared at the trial that the plaintiff had sold certain cattle to the defendant on the 25th of September, 1835, for the sum of 252*l*. The defendant paid 52*l*. down, and it was agreed that he was to pay the remainder by a bill at two months.

The question for the jury was, whether the bill drawn by the defendant, and by him put into the post-office, had ever reached the plaintiff; or whether one Jenkins, the post-master, had abstracted the letter containing the bill and put it into circulation. This fact the jury found in the affirmative; the jury, under the direction of his lordship, having allowed interest on the 220*l*. from the time stipulated for the delivery of the bill, by the defendant, to the day when the bill would have become due.

Erans now moved to reduce the verdict to 220*l*. by deducting the amount of interest so allowed, and contended that the only case in which juries were empowered to give interest under the 3 & 4 Wm. 4, c. 42, s. 28, is where a party makes a demand in writing and gives notice that he will insist upon interest; and that although several letters of the plaintiff were produced in evidence, there was nothing in any of them containing such a notice; that, as the statute was therefore out of the case, the question would be, whether plaintiff was entitled independently thereof. He relied upon *Foster v. Weston* (a).

(a) 6 Bing. 709.

LORD ABINGER, C. B.—The statute has nothing to do with the present case; interest would be claimable independent of it.

Exchequer.

PARKE, B.—The case of *Marshall v. Poole* (b) shews that where payment is to be made by the bill, interest becomes part of the price.

Rule refused.

(b) 13 East, 98.

Vide also *Becher v. Jones*, 2 Campb. 428, n.; *Porter and others v. Palsgrave*, ibid. 472; *Boyer and another v. Warburton*, ibid. 480.

LEE and others, on behalf of themselves and the rest of the Proprietors of the Lake Loch Railroad, v. Sir W. M. MILNER, Bart., and others, Trustees for the Undertakers of the Aire and Calder Navigation.

By the 9 Geo. 4. c. 98, the undertakers of the Aire and Calder navigation were empowered to make a canal from one part of the river Calder, to communicate with the river at another point, and also to construct a railroad from such cut to the highway between Leeds and Wakefield, and for such purposes to enter upon lands, making satisfaction as therein mentioned; provided, that in case of any dispute or differences between the undertakers and the parties interested in the lands, a jury should be summoned who should assess and ascertain the sum or sums of money

UPON a motion by the defendants, in *Trinity* Term, 1834, in this court, to dissolve an injunction awarded and issued against the defendants and the rest of the undertakers of the navigation of the rivers *Aire* and *Calder*, in the West Riding of the county of *York*, by an order made in this cause bearing date the 8th *February*, 1833, whereby the defendants and the rest of the said undertakers, their deputies, agents, servants, and workmen, were restrained from entering upon or taking possession of the piece or parcel of land in the said order mentioned, until the defendants should answer the plaintiff's bill, and this Court make other order to the contrary, Lord *Lyndhurst*, C. B., after hearing the parties by their counsel, continued the injunction, in order that the opinion of the Court might be taken upon the following case:—

Before the year 1803, a number of persons having formed themselves into a private company or partnership, by the name of the *Lake Loch* Railroad Company, now represented in interest by the plaintiffs and several other persons, made and completed, at their own expense, and principally on land belonging to the company, a railroad, known by the name of the *Lake Loch* Railroad, extending from certain staiths upon the river *Calder*, in the West Riding of the county of *York*, for about three miles in length, towards certain collieries situate at the western extremity of the line.

to be paid for the purchase of such lands, and also what other separate and distinct sum or sums of money should be paid by way of recompence either for the damages which should or might before that time have been sustained as aforesaid, or for the future, temporary, or perpetual continuance of recurring damages, which should have been occasioned as aforesaid, and the cause or occasion of which should have been only in part obviated, repaired, or remedied by them. It was also provided, that the undertakers should agree for, or cause to be valued and paid for, the lands which they were empowered to purchase, within five years after the passing of the act, and that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years.

A dispute having arisen as to the value of a piece of land, a jury was summoned, and assessed the value and future damages as follows;—Value of the land, 6*l.*; present damage 0; future damages, 2800*l.*

*Held*, first, that the assessment of future damage was void.

Secondly, that unless the undertakers had finally abandoned their intention of making the cut in the parliamentary line, they had a right at any time within the fifteen years to take possession of the land in question, on payment or tender of 6*l.* and that they had a right to go on simultaneously with the making both of the cut and the railroad.



Eschequer.

Law

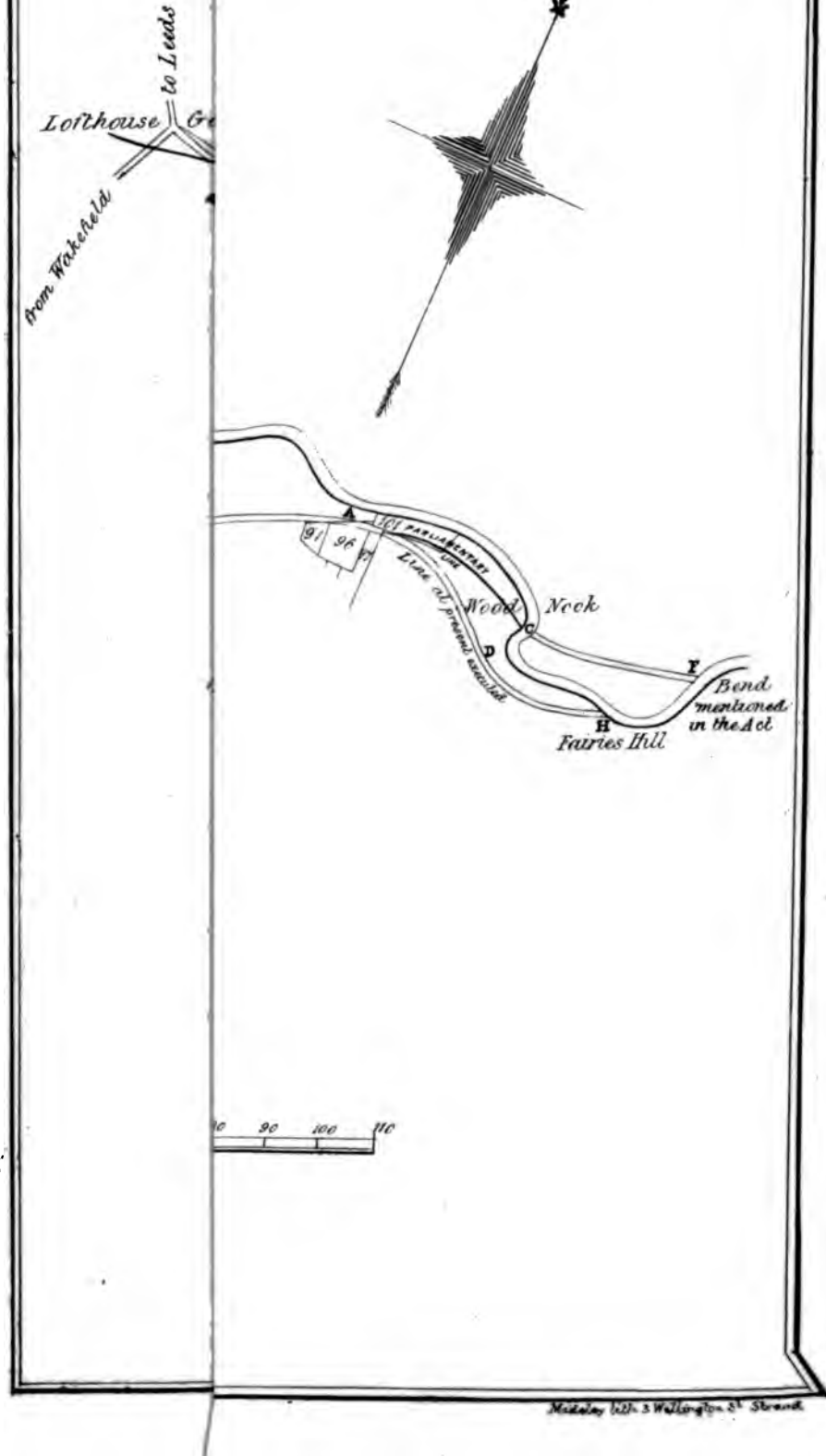
McLIVER.

The plan hereunto annexed (a) shows the *Lake Lock Railroad*, of which the part crossed by the line thereon at B 147, is made entirely in land belonging to the company; and the same plan shows also the various cuts, canals, ways, and other works, and the several places hereinafter mentioned and referred to. Ever since it was made, the *Lake Lock Railroad* has been constantly used for the carriage of coals by owners and occupiers of collieries, connected therewith by means of other railroads, and has thereby yielded to the company an annual profit from the tolls or dues paid for such carriage, amounting, upon an average during the last three years, to 700*l.* per annum, after deducting all expenses.

By several acts of parliament, and particularly by the 10 & 11 Will. 3. c. 19, the 14 Geo. 3. c. 96, the 1 Geo. 4. c. 39, and Geo. 4. c. 98, the undertakers of the rivers *Aire* and *Calder*, in the said West Riding, have been authorized, amongst other things, to make the said rivers navigable, and to make certain cuts, canals, and other works, and to improve the said navigation, under the several powers, provisions, and instructions, in the said several acts mentioned.

By the last of these acts, the 5 Geo. 4. c. 98, the said undertakers were, amongst other things, authorized and empowered, at their own costs and charges, to make, complete, and maintain, a navigable cut or canal from and out of the river *Calder*, at or near to a place called the *Broad Reack*, in the township of *Stanley-cum-Wrenthorpe*, in the parish of *Wakefield*, to communicate with the said river *Calder*, at or near to a place called *Woodnook*, in the township of *Altofts*, in the parish of *Normanton*; and an aqueduct over the river *Calder*, at or near to a place called *Stanley Ferry*, in the said townships of *Stanley-cum-Wrenthorpe* and *Altofts*; also, a collateral navigable branch or canal from and out of the said last-mentioned cut or canal, at or near to a place called *Foxholes*, to join and communicate with the river *Calder*, at or near a place called *Foxholes Bight*, both in the township of *Altofts* aforesaid; also a railway or tram-road, with proper works and conveniences for the passage of waggons, carts, and other carriages properly constructed, from the said intended cut from *Broad Reack* to *Woodnook*, at or near to *Stanley Ferry* aforesaid, to communicate with a public highway or turnpike-road leading between *Leeds* and *Wakefield*, at or near to a place there, called *Lofthouse Gate*, all in the township of *Stanley-cum-Wrenthorpe* aforesaid; also a navigable cut or canal, or new course or channel, for the said river *Calder*, from and out of the said river *Calder*, at or near to *Woodnook* aforesaid, to join and communicate with the said river at a bend therein in the township of *Methley*, below a certain place called *Fairies' Hill*; and to make and do divers other matters and things connected therewith, and with the other works mentioned and referred to in the said act. And for the purposes of the act, or any of them, the said undertakers, their deputies, servants, agents, and workmen, were thereby authorized and empowered to enter into and upon the lands and grounds of any person or persons, bodies politic, corporate, or collegiate, whomsoever and whatsoever, for the purposes in the act mentioned, doing as little damage as might be in the execution of the several powers thereby granted, and making satisfaction in manner hereinafter mentioned, to the owners or proprietors of, and all persons interested in, the lands, messuages, buildings, tenements, and hereditaments, weirs, waters, water-

(a) See the plan opposite this page.





courses, brooks, or streams, respectively, which should be taken or removed, directed or prejudiced, for all the damages to be by them sustained, in or by the execution of all or any of the powers of the said act.

By the sixth section it is enacted, that the said undertakers, in making the said intended cuts, canals, channels, branches, railways, or tram-roads, shall not deviate more than 100 yards of three feet each from the course or direction delineated on the map or plan, (which had been, in pursuance of s. 5, deposited with the clerk of the peace for the West Riding.)

By the 20th section it is enacted as follows: "and for settling all differences which may arise between the said undertakers and the several owners of and persons interested in the lands, grounds, messuages, mills, buildings, tenements, hereditaments, streams, brooks, weirs, dams, waters, or watercourses, which shall or may be taken, used, stopped-up, pulled down, damaged, affected, or prejudiced by the execution of any of the powers hereby granted, touching the purchase-money to be paid or recompence to be made to them respectively, *be it enacted*, that if any body politic, corporate, or collegiate, corporation aggregate or sole, trustee or trustees, tenant for life or in tail, husband or guardian, or any other person or persons, so interested as aforesaid, shall differ or shall not agree with the said undertakers, as to the amount of such purchase-money, recompence, or other compensation, and such amount cannot be adjusted, settled, and agreed for, by and between such parties and the said undertakers, or if such parties shall refuse to accept such purchase-money, &c., as shall be offered to them by the said undertakers or their agent, and shall give notice thereof in writing to the said undertakers, within fourteen days next after such offer shall have been made, and the party or parties giving such notice shall therein request that the matters in dispute may be submitted to the determination of a jury; or if any body politic, &c., or other person or persons, seised or possessed of, or interested in or entitled to, or capacitated to sell any such lands, &c., as aforesaid, shall, for the space of fourteen days next after notice in writing shall have been given to the principal officer of any such body politic, &c., or to such person respectively, or left at the last or usual place of his or her abode, &c., neglect or refuse to treat, or shall not agree with the said undertakers for the sale and conveyance of their respective estates and interests therein, or cannot be found, &c. &c.; (the clause then goes on to provide, in the usual terms, for the summoning, empannelling, &c., of a jury before the justices in sessions, to hear evidence as to the matter in controversy;) and such jury, upon their oath, shall inquire of and ascertain the sum or sums of money to be paid for the purchase of such lands, &c.; and also what other separate and distinct sum or sums of money shall be paid by way of recompence, either for the damages which shall or may before that time have been sustained as aforesaid, *or for the future, temporary, or perpetual continuance of any recurring damages which shall have been so occasioned as aforesaid, and the cause or occasion of which shall have been only in part obviated or repaired by the said undertakers, and which can or will be no further obviated, repaired, or remedied by them;* and the said justices shall accordingly give judgment for such purchase-money or recompence as shall be assessed by such jury, which verdict, and the judgment to be thereupon pronounced as aforesaid, shall be binding and conclusive, to all intents and purposes, against all bodies politic, &c., and all other persons whomsoever," &c.

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By the 27th section it is enacted, "that the juries shall award all determinations, judgments, and verdicts which they shall respectively make and give concerning the value of lands, tenements, and hereditaments, separately and distinctly, from any damages sustained or to be sustained, as aforesaid, and shall distinguish the value set upon lands, tenements, and other hereditaments, and the money assessed or adjudged for such damages aforesaid, separately and apart from each other."

The 29th section directs, "that all verdicts and judgments shall be kept by the clerk of the peace, and be deemed records to all intents and purposes."

By the 40th section it is enacted, "that upon payment or legal tender of such sum or sums of money as shall have been contracted or agreed for between the parties, or assessed by any jury or juries in manner aforesaid, for the purchase of any lands, &c., or as a recompence for the yearly produce or profit, or as a compensation for damages as hereinbefore mentioned, to the proprietor or proprietors of such lands and premises, or such other person or persons as shall be interested therein, or entitled to receive such compensation, within one calendar month after the same shall be so agreed for, determined, or awarded, or if the person or persons so entitled or interested, or any of them, cannot be found, or shall refuse to receive the same, or shall not make a good title to, or shall refuse to execute a conveyance or conveyances of the lands or premises which shall be required for the purposes of this act, then, upon payment of such sum or sums of money into the Bank of *England*, for the use of the person or persons so interested or entitled as aforesaid, it shall be lawful for the said undertakers, and their agents, servants, or workmen, immediately or at any time, to enter upon such lands, tenements, or hereditaments, respectively, and then and thereupon the lands, &c., and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth become the property of the said undertakers, to and for the purposes of this act for ever, &c. Provided, nevertheless, that before or until such payment or legal tender, as aforesaid, it shall not be lawful for the said undertakers, or any person or persons acting by or under their authority, or under the provisions of this act, to dig or cut any land or ground, or to take down or remove or alter any messuage, mill, building, tenement, or other hereditament, for the purpose of making the said cuts, canals, channels, branches, railways, tram-roads, docks, basins, and other works, or any part thereof, without leave or consent in writing of the proprietor or proprietors thereof respectively entitled to such payment; and in case any person or persons shall enter upon any such land, ground, or premises, and commit any such offence, before or until such payment or legal tender shall have been made, each and every such person so offending, shall forfeit the sum of 5*l.* for each and every day he shall remain or be on such lands or premises, to the proprietor or proprietors of the lands or premises."

And by the 110th and 111th sections of the last-mentioned act, it was further enacted as follows:

Section 110—"That if the said undertakers shall not, within the space of five years, to be computed from the passing of this act, agree for or cause to be valued and paid for as in this act is mentioned, the lands, tenements, or other hereditaments which they are by this act empowered to purchase, (or

so much thereof as shall be deemed necessary or proper,) for the purposes of making the said intended cuts, &c., and other works hereby authorized, then and thenceforth those powers which are hereby granted to such undertakers, for such purposes only, shall cease, determine, and be utterly null and void, save and except with the consent of the owner of such lands, tenements, and hereditaments."

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Section 111—" And be it further enacted, that in case the said intended cuts, &c., and other works, shall not be completed and made navigable and passable, so that boats, barges, waggons, carts, and other carriages, properly constructed, may pass along the whole line, within the space of fifteen years from the passing of this act, then from and immediately after the expiration of the said term of fifteen years, all the powers, authorities, and privileges given by this act, shall cease and determine, save only and except in respect of so much (if any) of the said cuts, &c., or any of the works hereby authorized to be made, as shall have been completed and made navigable and passable, within the said term of fifteen years."

The undertakers, after the passing of the last-mentioned act, effected purchases, or entered into contracts for the purchase, of all the land required for making the said cut or canal from and out of the river *Calder* at *Broad Reach*, to communicate with the said river at *Woodnook*, and they proceeded to make, and have completed, a part of the said cut or canal, viz. from the point K, eastward, to the point A, on the plan hereunto annexed.

In the part of the cut or canal which has so been made between the said point K and A, the undertakers have not deviated more than 100 yards from the course or direction mentioned or referred to in the said act of parliament, and delineated on the map or plan deposited at the office of the clerk of the peace.

The undertakers have purchased, by private contract, and for their own use, and as their own property, certain lands lying to east and south-east of the said point A; they have made a cut or canal eastward, from the said point A to the point D, marked on the plan, and thence continuing eastward to a place lower down the river *Calder* than *Woodnook*, in the plan also described, namely, near *Fairies' Hill*, at the point H on the same plan; the whole of which last-mentioned cut or canal, from the said point A to the said point H, is made through the land so purchased by the undertakers for their own use, and as their own property, and without reference to or under the powers of the said act of parliament, 9 Geo. 4, c. 98. Such last-mentioned cut or canal, from the point A to the point H, passes more than 100 yards of three feet each from the course or direction marked on the said plan; and the undertakers have not made or begun to work that part of the cut or canal which in and by the plan is described as extending from the said point A, to *Woodnook*.

The part of the cut or canal which has been thus made by the undertakers, from K to H, has been completed with locks, lock-houses, bridges, and other works, and has already been and is now navigated. The collateral navigable branch from it, at K, to join the river *Calder* at *Foxholes Bight*, has also been made and completed by the undertaker. The said other projected cut or canal, or new source or channel for the river *Calder*, in the said act mentioned, between C and F on the plan, has not yet been begun.

The above mentioned projected railway or tram-road, on the plan hereto

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annexed, crosses the *Lake Lock* Railroad at B 147. The undertakers have not yet made it in any part of the line, but they have entered upon, staked, set out, and ascertained such parts thereof as they think necessary for making and completing the said railway or tram-road, and which is in the line or direction delineated and described upon the said plan; and they have purchased and paid for the whole of the said land, except the piece of land in question in this suit, and one other piece; the purchase money for which two pieces of land, were paid into this court on the 2nd day of *February*, 1833.

(The case then set out the notice, given by the undertakers to the *Lake Lock* Company, of their readiness to treat for the sale of the piece of land numbered 147, and the other notices preliminary to the summoning of a jury to assess the value.)

In pursuance of such last-mentioned notice, an inquiry, under the 20th section of the said act of the 9 Geo. 4, was had at the January quarter sessions, 1833. Upon that inquiry, evidence on both sides having been gone into, and the matters of such evidence, and of the arguments of counsel, having been left by the Court to the consideration of the jury, they the said jury (who, at the instance of the said undertakers, had viewed the *locus in quo*.) gave the verdict as follows, viz.:—

Eight perches of land, value.....	£ 6
Present damages . . . . .	0
Future damages . . . . .	2800

Immediately upon the said verdict being given in, the counsel for the undertakers objected to that part of the finding whereby the jury assessed the price of 2800*l.* for future damages; nevertheless, under the supposed authority of the same last-mentioned section of the said act, the justices in quarter sessions pronounced their judgment, and the clerk of the peace afterwards drew up a record thereof in the terms following. (The record was then set out.)

On the 29th of *January*, 1833, the undertakers caused a notice in writing of that date to be served upon the said *John Lee*, which is as follows. (This was a notice to deliver an abstract of title to and execute a conveyance of the land, offering payment of the 6*l.* awarded by the jury as the purchase money, and giving notice that the undertakers considered the finding as to the 2800*l.* for future damages, to be null and void.)

No abstract of title was furnished, nor was any conveyance executed by the company to the undertakers. On the 2nd of *February*, 1833, the undertakers paid the said sum of 6*l.*, and no more, into the Bank of *England*, for the use of the company. On the 8th of *February*, 1833, the company filed their bill on the equity side of this court, and on the same day obtained, *ex parte*, an injunction to restrain the undertakers from entering upon the same land until they had answered the said bill, and this Court had made other order to the contrary.

The questions submitted for the opinion of the Court are the following, viz.:—

1. Whether the defendants have now power to enter on 147, supposing them not to have any intention to complete the cut from *Broad Reach* to *Woodnook*, in the line described in the parliamentary plan?

2. Whether they have now such power, supposing them *bond fide* to intend to make and complete the said cut?

2. If the Court should be of opinion that they have now such power, then

whether they will have such power after they shall have completed the said cut, supposing them to complete the same within fifteen years, from the passing of the said act?

4. Whether the defendant can take the land marked 147 on the plan, without paying or tendering the sum of 2800*l.* assessed by the jury as future damages.

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*Starkie* for the plaintiff.—The first question is whether the defendants have now power to enter upon the land in dispute; they having no intention to complete the cut from *Broad Reach* to *Woodnook*. It is submitted that they have not. The act of parliament is in the nature of a private bargain, between the undertakers and the public, and they are invested with the powers contained in it, only on the faith of their completing the works. Their power to enter is limited to the purposes of the act. It is true, that if trespass were brought against them, they might justify under the act; but then the plaintiffs might shew that they did not enter, for the purposes mentioned in the act. *Blakemore v. the Glamorganshire Canal Company*(a); and *Rex v. Cumberworth*(b), are authorities in point. In the former case, Lord Eldon says, "I apprehend that those who come for these acts to parliament, do in effect undertake, that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else: that they shall do and forbear all that they are there required to do; and to forbear, as well with reference to the interests of the public, as with reference to the interests of individuals." [Lord Abinger, C. B.—How is it to be assumed, that they have finally given up the intention of making the cut?] At all events, the five years having elapsed, they cannot take the land, without first paying the price.

The next question is, whether they have now power to enter on the land, supposing they *bona fide* intend to complete the cut. They are bound to use the powers given by the act for the purposes contemplated by it: they cannot, therefore, make a railroad to communicate with a different line of canal than that mentioned in the act, and they cannot take the plaintiff's land for such a purpose.

Nor will they have such power to enter, even when the cut is completed. The act specially provides that land must have been taken within five years, and that period has now elapsed. [Lord Abinger, C. B.—The five years had not elapsed when they filed the bill, and therefore the case will stand as it was at that time.]

Then, it is said, that the jury can only assess the damage which has actually occurred. But, it is submitted, that it was the intention of the act to give compensation for all damage, present and future, and that the damages were to be estimated prospectively, whatever might be the nature of the damage. This is evident from the language of the 27th section, which speaks of damages sustained or *to be sustained*. This future damage is to be estimated at the time when the value of the land is assessed. There can be no damage before entry. If the construction to be put upon the clause is, that it applies only to damage which has actually occurred, the whole clause will be confined to the "*recurring*" damage, so as to exclude damage of a perpetual nature,

(a) 1 Myl. & K. 154.

(b) 3 B. & Adol. 108.



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as is the case of a water-course stopped up. In *Rex v. the Leeds and Selby Railway Company* (c), and in *R. v. London and Greenwich Railway Company*, the terms used were for the future, temporary, or perpetual, or for any recurring damages, &c.

*Wightman, contrà*.—As to the last question, which is the most important, it is contended, that the jury are to speculate as to the future recurring damage. It is stated in the case, that the value of the *Lake Loch Railway* is 700*l.*, and the jury have given four times that amount for future contingent damage. [*Alderson, B.*—Suppose you never make your railway; what will be the damage then?] None whatever; and in that case the party would have had a compensation in damages for an injury that had never occurred. The clause is not confined to damage occasioned by the entry on the land, but extends to injuries arising from the carrying on of the works. The words clearly refer to a damage which *has been* occasioned by the progress of the works.

With regard to the other parts of the case. The undertakers disclaim any intention to deviate from the parliamentary line; whether they could take the land, supposing the fifteen years had elapsed, and they had not entered, nor had completed the parliamentary line, is another question. [*Parke, B.*—The undertakers have no power to purchase, except for the purposes of the act; if, at the time of entry, they had no intention of carrying the act into effect, it is clear they had no right to take the land.] The point here is, whether they are to wait till they have made the canal before they can take the land for the railroad. [*Parke, B.*—And the parties through whose land the canal goes may say the same; so neither might ever be finished.] It is evident, then, that the works may proceed simultaneously.

Lord ABINGER, C. B.—With regard to the first question submitted for our consideration, if it had appeared to be admitted on the face of the answer put in by the defendants to the bill for the injunction, that they had abandoned the intention of completing the cut from *Broad Reach* to *Woodnook* in the parliamentary line, I should have been induced to think that a good reason for continuing the injunction; because I think they have no right to take the land, except for the specific purposes described in the act. As it is, however, this question appears to be purely a speculative one, and there is no occasion that we should make any observation on it at all. With regard to the second and third questions, which assume a present intention on the part of the undertakers to comply with the act, I think we must answer them in favour of the defendants. It appears to me that they have a right to go on simultaneously with the different works. They have, in the first place, five years within which to take the land, and they need not commence their works until after that period; and perhaps it may be expedient for them to ascertain the price of all the land they may require for their several works, and to get possession of the whole before they begin their operations on any part of it.

The last question is that of the greatest importance; and upon that I think that the verdict in respect of these contingent and imaginary damages which may never occur at all, is a mere nullity. I think the true construction of the

act is, that the "recurring damages" must be taken to mean damages, *ejusdem generis*, with those which have already arisen, it being open to a party, when a new description of damage ensues, to have a new remedy, either by action, or, if the act justifies it, by a jury summoned pursuant to the act of parliament. In the latter case, if, when the company commence their operations, (the land having previously been valued and paid for,) their tram-road shall be found to do damage to the adjoining lands of the *Lake Loch* Company, or, in the making of it, they shall obstruct the passage on the *Lake Loch* road, or continually obstruct the cross-roads, so as to prevent the traffic upon them, then the parties so damaged may apply for compensation under that particular head, and obtain it. But in this case the jury have found no damage yet sustained; how then can they find a verdict for contingent damages which may never occur at all? As, for example, what would be the case if the company were not to make the tram-road, but, having taken and paid for the land, were to leave it in its present condition for ever? It seems to me, that such a verdict is a nullity, and that no action would be maintainable upon it. If that be so, then I think that, in a court of equity, the judge would be guided by the same considerations, and would not consider the verdict as standing in the way of the company's operations, nor compel them to pay the money awarded before proceeding with their works.

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PARKE, B.—I am of the same opinion with my Lord Chief Baron. With respect to the first question, if it be assumed that the *Aire* and *Calder* undertakers have abandoned all intention of completing their cut according to the parliamentary line, then I should answer, that they cannot go upon the piece of land numbered 147, because I conceive they have entered into a bargain with the public, and that they have a right of making the railroad communicating with the cut only upon the faith of their complying with that parliamentary bargain. That is the rule laid down by Lord *Eldon* in *Blake-more v. the Glamorganshire Canal Company* (b), and still more strongly by the Court of King's Bench in the case of *The King v. Cumberworth* (c). Looking at the terms of this act of parliament, it appears to me that we are bound to follow the rule as it is laid down by Lord *Eldon*; and, therefore, I think it is a condition precedent to the exercise of the powers given by the act, that the proprietors make that line which they have stipulated for, and they have no right to deviate from it as they have done, even although they make a diversion on their own land, such a diversion not being provided for in the act of Parliament. The powers granted to them for making a railroad to communicate with the parliamentary line, are granted on the faith of their giving the public the benefit of the navigation along that line. That is the opinion I have formed in this case, provided it is clearly made out that the company have abandoned the intention of completing the parliamentary line. If they have not abandoned it, or if they choose to resume it, then they now have a right to enter upon all such lands as they have bargained for, within the five years, for the purpose of completing the parliamentary line. They have now a power to abandon their original intention of deviation, and may enter on the land contracted for, on payment of such sum, for the value of it, as they ought to pay, in pursuance

(b) 1 Myl. & K. 154.

(c) 3 B. & Ad. 108.

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of the finding of the jury. And I am of opinion also that they have such power before they have completed the line of the canal extending from one terminus to the other. They have a power to go on with all their works at the same time.

What I have said, answers the first three inquiries that were submitted to the consideration of the Court. With regard to the fourth, which is the most important, I concur in opinion with the Lord Chief Baron in the construction he has put upon the clause of the act of Parliament which relates to this part of the case. The act undoubtedly is very obscurely worded, and the obscurity is increased in no small degree by the section which prohibits the undertakers from entering upon the land until they have paid for it. However, looking at the clause in question, it seems to me, that the jury have no right to assess prospective damages, except after, (if I may so say,) an *example* of damage has already occurred; that is, in accordance with the language of the section; and I think it would be impossible for the jury fairly to perform their duty, unless they had such an example to go by. The undertakers have a right either to treat with the parties interested in the lands, or to go before a jury. Then the provision respecting a jury is this—that “they shall inquire of, assess, and ascertain the sum or sums of money to be paid for the purchase of such lands, grounds, &c., and also what other separate or distinct sum or sums of money shall be paid by way of recompence, either for the damages which shall or may, before that time, have been sustained as aforesaid;” *i. e.*, which shall or may, before that time, have been sustained by the execution of any of the powers thereby granted; that is, something that is actually done, something that is completed,—but not only for that, but also “for the future, temporary, or perpetual continuance of any recurring damage which shall have been so occasioned as aforesaid;” *i. e.*, the cause of which shall exist, in execution of the powers of the act. The cause of the damage must, therefore, have existed in something more or less done or completed by the Company; and there is a further limitation to cases where the cause or occasion shall have been only in part obviated or repaired by the undertakers, for that must be the fair reading of the clause, “and which can or will be no further obviated, repaired, or remedied by them.” The cause of injury must, therefore, exist in some work of the company which is already then done; and that work must be in such a state as to be incapable of further alteration, so as to obviate the damage. That being the case, and there being a *permanent subsisting cause*, and the work being incapable of beneficial alteration, so as to prevent mischief to others, then, and then only, have the jury the power of computing the future damage. That is fair and reasonable: there is a permanent cause; they know how often the injury may accrue, and what it is at present; and from these data they have the power of making a contingent assessment of damages. I would put, as an example, the case of *leakage* through the banks of the canal, or the interruption of some watercourse, the effect of which you can collect from a by-gone time, so as to afford some proper estimate with regard to future time. And it is in that case only, as it seems to me, there is power to assess future damages. In the present case, the jury expressly find that there is no injury already committed; and, therefore, there is nothing in respect of which they can assess future damages, and their finding seems to me to be totally void, as to that part, though it is good for 6*l.*, the value set upon the land itself. Whenever the *Lake Loch* Company do re-

receive any actual injury from the works of the undertakers by the interruption of their trams from moving along the road, and so often as they receive any injury, they will have a right to call upon a jury to make compensation to them.

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BOLLAND, B.—concurred.

ALDERSON, B.—I am of the same opinion. I do not give any decided opinion upon the first question in the case, because I am not prepared to say, that the company are precluded from taking possession of the land, unless they have *finally* abandoned the making the canal in the line described by the act of Parliament, seeing that they have by the act the term of fifteen years during which they are to make it. The case of *Blakemore v. the Glamorganshire Canal Company*, was totally different, I apprehend, from the present. There the time for making the works had long elapsed when Lord Eldon delivered his judgment; and the question was, whether, it not being so, and the company preparing to make new works, not authorized by the act of parliament, but which were prejudicial to Mr. *Blakemore*, the Court was authorized to grant an injunction against the company to restrain them from making those works. It was held, and, as it seems to me, on the soundest principle, that these are mere parliamentary bargains between the one party and the other, and the power of making the works is to be restricted to a given and specific time; and the moment that time has elapsed, without the powers given by the act having been exercised, the parties against whom those powers are to be exercised have a right to prevent their being in future exercised by injunction of the Court of Chancery. But I apprehend, that, unless it were found, in this case, that the undertakers had finally abandoned the intention of making the canal from one terminus to the other, it would not be competent for us to say, that the Court of Equity ought to grant an injunction against them to prevent their taking possession of the land in the intermediate part. With respect to the other points in the case, I apprehend it to be quite clear that the parties are at liberty to make the railway and the canal contemporaneously; otherwise this absurdity would follow, that it would be A. waiting for B., and B. waiting for A., inasmuch as the canal is just as much a condition precedent to the railway as the railway is to the canal; it would then be impossible to take possession of the land for making the canal until the railway was made, and impossible to take possession of the land for making the railway until the canal was made, which is so gross an absurdity that it is clear the works must have been intended to go on contemporaneously; and the parties are not to be precluded from taking the land for the railway until they have completed the canal. With respect to the compensation for damages, which is really the material question in the case, I think, that after the jury had found that no damage existed at the time they were summoned to assess the compensation for it, it conclusively follows, that they cannot assess any future damages, because they are precluded from considering the question of future damages until they have ascertained the existence of present damages. I agree, therefore, that that part of the verdict is altogether void and that the company have a right to enter, on tendering, as they have tendered, the 6*l.* for the land. I also think, that, if there shall be damage

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incurred in future by the separation of the land, and by taking the railway across it, these parties will have a clear right to come before a jury, not only for present, but for future damages, if they can make them out.

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The first count was on a bill of exchange, drawn by the plaintiff and accepted by the defendant in Scotland. The second count was on a similar bill, and, after stating the drawing and acceptance, set forth the registering of a protest of non-payment in the Court of Session in Scotland, and the issuing of letters of horning and poiding against the defendant, and then alleged that, by virtue of the premises, the defendant became liable to pay. *Held*, that this latter count was in effect a count on the bill, and did not disclose a sufficient cause of action as upon a judgment in Scotland. The particulars of demand stated the action to be brought to recover the amount of the bill mentioned in the first count with interest, and that the plaintiffs would rely on the whole or any part of the declaration for the recovery thereof. *Held*, that, under this particular, the plaintiffs might give evidence in support of the second count.

THE first count of the declaration was on a bill of exchange for 23*l.* 12*s.* dated 15th *January*, 1829, drawn by the plaintiffs in *Scotland*, upon and accepted by the defendants, payable to the order of the plaintiffs, three months after date, at a certain place in *Scotland*, to wit, at the cellars of the plaintiffs, 103, *Hutcheson Street, Glasgow*. The count alleged that the bill was duly, according to the law of *Scotland*, presented and protested for non-payment, to wit, on the 7th *September*, 1829.

The second count stated, that the plaintiffs, on the 15th *January*, 1829, in *Scotland*, made their bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the order of the plaintiffs, at a certain place in *Scotland*, to wit, at the cellars of the plaintiffs, &c., 23*l.* 12*s.*, three months after the date thereof, which period had, before the protesting and registering of the said bill and protest, as thereafter mentioned, elapsed; and the defendant then accepted the said bill, but did not pay the same when due, although the same was duly, according to the law of *Scotland*, presented and protested for non-payment, at the place where the same was so made payable as aforesaid, when the same was due, to wit, on the 7th *September*, 1829; and thereupon afterwards, and after the said bill had been so made, accepted, presented, and protested for nonpayment, and after the same was due and payable according to the tenor and effect thereof, to wit, on the 7th *September*, 1829, the said protest was duly, according to the law of *Scotland*, registered on behalf of the plaintiffs, in the court of our late lord King *George* the Fourth, before the lords of council and session at *Edinburgh*, in *Scotland*; and thereupon afterwards, and after the said registering was so made as aforesaid, to wit, on the 8th *September*, 1829, his said late majesty's letters of horning and poiding did issue out of the said court, at the suit of the plaintiffs, against the defendant, directed to certain officers therein mentioned, conjointly and severally, to wit, amongst other officers, to the messenger at arms, whereby our lord the said late king charged the said messenger at arms, on sight thereof, to pass, and in his majesty's name and authority lawfully command and charge the defendant personally, or at his own dwelling-house, to make payment to the plaintiffs of the aforesaid principal sum of 23*l.* 12*s.* sterling, and the legal interest thereof since the said bill fell due, till payment, after the form and tenor of the said bill and registered process, in all points, within six days next after he should have been charged thereto, under the pain of rebellion and putting him to the horn; wherein if he should fail, the said space being elapsed, immediately thereafter to denounce him his said majesty's rebel, put him to the horn, and use the whole other order against him prescribed by law; which said letters afterwards, to wit, on the day and year last aforesaid, were duly delivered to W. J., then and from thence until and at the time of the making of the charge thereafter mentioned, being the messenger at arms to whom the said letters were so directed, as aforesaid, to be

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executed according to the law of *Scotland*; and thereupon afterwards, and after the delivery of the said letters to the said W. J., as aforesaid, to wit, on the 9th *September*, 1829, by virtue of the said letters of horning and poinding, raised at the instance of the plaintiffs against the defendant, the said W. J. so then being such messenger-at-arms as aforesaid, in *Scotland* aforesaid, passed, and in his said late majesty's name and authority lawfully commanded and charged the defendant, at his dwelling-house, being in *Scotland* aforesaid, to make payment to the plaintiffs, of the said principal sum and interest, and that within the space of six days then next following; and under the pain of rebellion, and putting him to the horn, with certification, a just copy of the said charge, in virtue thereof, signed by the said W. J. as such messenger, and bearing a certain date, to wit, the day and year last aforesaid, and also the date and signetting of the aforesaid letters, with the names and designations of the subscribing witnesses, and to the aforesaid effect, the said W. J., so then being &c., then, at the time of making the said charge, to wit, on &c., left for the defendant in the hands of a servant, within the said dwelling-house, at Port *Dundas*, in *Scotland*, to be given to the defendant, because, after due inquiry made by the said W. J. so being &c., for the defendant, the said W. J. could not find the defendant personally at the time of making the said charge, or leaving the said copy: all which acts and proceedings were so done, taken, and happened as aforesaid, in *Scotland* aforesaid, according to the law of *Scotland*; yet the defendant did not make payment of such principal and interest, within the said space of six days, but the same, at the expiration of the said six days, and from thence until the promise thereafter next mentioned, continued wholly due and unsatisfied to the plaintiff; whereupon, and by virtue of the said several premises, after the said six days had expired, to wit, on the 1st *October*, 1829, the defendant became and was liable to pay to the plaintiffs, the said principal sum in the said bill specified, with interest thereon, from the time when the bill became due until payment; and being so liable, the defendant thereupon afterwards, to wit, on, &c., in consideration of his said liability, promised the plaintiffs to pay the said principal and interest to the plaintiffs on request; yet he hath disregarded his promise, &c. &c. There was also a count on an account stated.

*Pleas*, first, as to all the declaration, except the first count, non-assumpsit: secondly, as to the first count, that the defendant did not accept the bill in that count mentioned, in manner and form, &c.; thirdly, to the whole declaration, the Statute of Limitations; on which issues were joined.

The particulars of demand annexed to the record, were as follows:—"This action is brought to recover payment of the sum of 23*l.* 12*s.*, being the amount of the bill of exchange, mentioned in the declaration; and also the sum of 6*l.* 19*s.* being the amount of interest due on the said bill, at the time of the commencement of this suit, &c.; and the plaintiffs will rely upon the whole or any part of their declaration, for the recovery thereof."

At the trial before Lord *Abinger*, C. B., at the London Sittings, after last *Hilary* Term, the plaintiffs gave no evidence of the original acceptance of the bill by the defendant; but they put in office-copies of the registered protest, and of the letters of horning and poinding (a), and the return thereto; and

(a) The letters of horning and poinding were in the following form:—  
 "George the Fourth, &c., to —, mes-

senger-at-arms, our sheriff in that part, conjunctly and severally, specially constituted, greeting. Whereas our *lovetes*, *Hil-*

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proved the making of the charge and execution of the pointing, at the dwelling-house of the defendant, at *Port Dundas*, near *Glasgow*, on the 9th and 17th of *September*, 1829. The messenger-at-arms duly appraised the defendant's goods, but did not sell them, the landlord having sequestered them for his rent. This action was commenced in *August*, 1835.

Mr. *Mackenzie*, a *Scotch* advocate, who was examined for the plaintiffs, as to the proceedings necessary in such a case, by the law of *Scotland*, to bar the Statute of Prescription, 12 Geo. 3, c. 72, (continued by 23 Geo. 3, c. 18,) stated that, according to the *Scotch* laws, a bill of exchange is usually protested on the third day of grace, or, against the acceptor, within six months from that day; then the protest may be immediately recorded in the books of the Court of Session, or of the sheriff, and thereupon a warrant of execution may be immediately issued from the Court of Session against the debtor. If no action is raised, or execution issued, within six years from the last day of grace, the bill is affected by the Statute of Limitations; but if diligence is raised and executed, or action commenced, within the six years, the Statute of Limitations is barred, and the party may commence an action at any time within forty years. The witness then described the forms of the process of diligence by protest (b), registering the same in the books of Court,

*Wm Hay & Co.*, spirit merchants in *Glasgow*, by their bill, dated the 15th day of *January* last, drawn by them upon, and accepted by, *John Fisher*, spirit merchant, *Port Dundas*, ordered the said acceptance, three months after date, to pay to their order, at their cellars, 103, *Hutcheson Street*, the sum of 23*l.* 12*s.* sterling, value in spirits, which bill was, when payable, duly protested, at the instance of our lovites, the said *William Hay & Co.*, against the said *John Fisher*, for non-payment of the contents, &c.; and the instruments of protest taken thereupon, duly registered in the books of our Council and Session, and a decree of the lords thereof interposed thereto, of this date, as the same, ordaining these our letters in manner underwritten, and all other necessary execution, to pass thereon, more fully bears:

"Our will is, therefore, and we charge you, that, on sight thereof, ye pass, and in our name and authority, lawfully command and charge you, the said *John Fisher*, personally or at his dwelling-house, to make payment to our lovites of the aforesaid principal sum of 23*l.* 12*s.* sterling, and the legal interest thereof since the said bill fell due till payment, after the form and tenor of the said bill, registered protest, and decree aforesaid, in all points, within six days next after he is charged by you thereto, under the pain of rebellion and putting him to the horn; wherein if he fail, the said space being elapsed, that immediately thereafter ye denounce him our rebel, put him to the horn, and use the whole other order against him prescribed by law; attour, that ye lawfully fence, arrest, apprise, compel, poind, and distrain all and sundry the said *John Fisher's* readiest moveable goods, of whatever denomination, poundable or distrainable, and, wherever the same can be found,

make penny thereof, to the avail and quantity of the aforesaid sum, and see the said *William Hay & Co.* completely satisfied and paid of the same, after the form and tenor aforesaid, in all points, according to justice, as ye will answer to us thereupon. Which to do, we commit to you and each of you full power by these further letters, delivering them by you duly executed and indorsed again to the bearer. Given under our signet at *Edinburgh*, the 8th day of *September*, in the tenth year of our reign, 1829. *Per decretum Domini concilii.*"

(b) This proceeding is founded on the *Scotch* act of 1681, c. 20, which is in the following terms. After reciting "how necessary it is for the flourishing of trade that bills or letters of exchange be duly paid and have ready execution, conform to the custom of other parts;" it is enacted, "that, in case of any foreign bill of exchange from or to this realm, duly protested for not acceptance or for not payment, the said protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the said bill, in case of non-acceptance, or after the falling due thereof, in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser, in case of a protest for non-acceptance, or against the acceptor, in case of a protest for non-payment, to the effect it may have the authority of the judges thereof interposed thereto; that letters of horning, upon a simple charge of six days, and executories necessary, may pass thereupon for the whole sums contained in the bills, as well exchange as principal, in form as effairs, sick like and in the same manner as upon registered bonds or decreets of registration proceeding upon

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and the issuing and execution of the letters of horning and poinding; and stated that the diligence is complete, so as to bar the prescription, when the debtor has been charged by the messenger to make payment, and of which charge the legal evidence is the return of the officer, written on the letters of horning. On cross-examination, he said that the original protest recorded in court, was held to be a *judgment*, and the judgment was complete upon the registration.

For the defendant, it was objected, first, that the particulars delivered, which stated the action to be brought on the bill mentioned in the *first count* of the declaration, did not entitle the plaintiffs to recover under the *second count*, as upon the alleged judgment obtained in *Scotland*. Secondly, that no judgment or decree of the *Scotch* Courts was stated in the second count, or proved by the evidence; at all events, none within the period of prescription; that the count was rather a count on the bill of exchange, than on a judgment; and the whole of the facts from which the promise was implied, were put in issue by the plea of non-assumpsit—among them the acceptance, which had not been proved. The lord chief baron thought the statement of the bill in the second count was inducement only, and that the count was sufficiently proved; he however reserved both the points for the opinion of the Court, and directed the verdict to be entered for the plaintiffs on the first and third issues, and for the defendant on the second.

In *Easter Term*, *Creswell* moved for a rule *nisi* to enter a verdict for the defendant, on the issues found for the plaintiff.—The Court refused the rule on the point as to the particulars, saying, that the defendant could not have been misled, as the plaintiffs stated they should rely upon the whole or any part of the declaration for the recovery of their claim. A rule having been granted on the other point,

*Shee* and *Addison* shewed cause.—It was clearly proved, that the registration of the protest was a judgment according to the *Scottish* law. The previous statement in the count as to the bill is mere inducement, and it was unnecessary to prove it. The terms of the statute of 1681, shew, that this proceeding by diligence is as final in *Scotland* as any judgment can be. The object of the registration is, “that the authority of the judges may be interponed thereto.” Then follows execution, viz., the process by horning and poinding, or the pursuers may have an action on the registered protest, thereby also treating it as a judgment. The 12 Geo. 3, c. 72, also treats the proceeding by diligence as equivalent to an action. But the act of 1681 expressly says, that execution may pass upon the protest, “in the same manner as upon registered bonds or decrees of registration, proceeding upon consent of the parties.” And the letters of horning profess to be founded “on a protest duly registered in the books of our Council and Session, and a decree of the lords thereof interponed thereto.” Besides, the evidence of the *Scottish* advocate was conclusive upon this point. [Lord *Abinger*, C. B.—The difficulty I have is this: the form of a declaration upon a foreign judgment is, to state, that by

consent of parties: Providing always, that if the said protests be not duly registered within six months in manner above provided, then and in that case the said bills and protest are not to have summary execu-

tion, but only to be pursued by way of ordinary action, as accords,” &c. By a subsequent act of 1806, c. 36, the former act was extended to *inland* bills.



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the judgment of such a court the plaintiff recovered. Is there any part of the second count which alleges a judgment?] The declaration states that which is equivalent to a judgment. It was not necessary to shew the ground of the judgment; the declaration might have stated merely the judgment itself. *Walker v. Witten (c)*. [Lord Abinger, C. B.—Undoubtedly the plaintiff might have declared that on such a day, and by virtue of a judgment of the Court of Session in *Scotland*, he was entitled to demand a certain sum of money of the defendant.] If there appears a sufficient cause of action, without the averment respecting the bill, it is unnecessary to prove it. [Lord Abinger, C. B.—But you do not state, upon the face of the count, that there was a judgment.] The same objection was taken in *Crawford v. Whittal (d)*; but the court held the count sufficient. The defendant, by his form of pleading, has treated the second count as a judgment.

*Cresswell, contrd.*—This is more like a count upon a bill than on a judgment: it begins by averring that the bill was accepted, and that the party became liable, and therefore promised to pay. There is no promise to pay the sum mentioned in the judgment. The letters of horning require the defendant to pay the amount of his acceptance; the promise also averred in the count, is a new promise to pay the amount of the bill. It is not alleged that he undertook to pay any part of the judgment, nor is it averred that there is a judgment. Matter is alleged as a consideration for the promise which is not in fact so: therefore the count is not proved. [Parke, B.—The question is, whether the registration constitutes a new debt, which may be sued upon in another country.] Of what court has there been the “consideration and judgment?” By what tribunal has it been decreed, that the plaintiffs are entitled to recover the money? All the count states is, that the holder of the bill protested it for non-payment and registered the protest. [Parke, B.—As soon as the protest is registered, it is equivalent to a registered bond.] It is contended that the subsequent action is on the diligence, but that is not so; the action is in fact still on the bill, only the registration and subsequent proceedings have the effect in *Scotland* of barring the prescription on the bill. The proceeding is similar to process issued out of the court of the county palatine of *Durham*: there the party begins with execution, and petitions the bishop to have the goods sold, if the debtor do not appear within a certain number of days. [Parke, B.—Should not the count have averred that the bill was registered according to the *Scottish* law, and that such an instrument constitutes a debt?] That would have been sufficient to have shewn a liability; here it is a mere inference drawn from the premises. If the statement as to the bill be struck out, what cause of action appears? There should have been an averment that, by the law of *Scotland*, the defendant was liable to pay that sum. *Cresswell* was then stopped by the Court.

LORD ABINGER, C. B.—I am of opinion that we can only look at this as a count on a bill; all the rest is unintelligible matter, which may form the materials of a judgment, but it is not averred to be a judgment.

PARKE, B.—I am of the same opinion, and think there is not a sufficient

(c) 1 Doug. 1.

(d) Cited 1 Doug. 1.

statement in the declaration to warrant a verdict for the plaintiff, independently of the defendant being the acceptor of the bill. There is no doubt the count was not demurrable, because it is stated that the defendant accepted the bill, which is sufficient to shew a liability. Then if the averment of the acceptance is struck out, would a good cause of action be disclosed? I think not. It ought to have been averred, as a matter of fact, either that the registration was equivalent to a decree, or that there was a decree. But the only allegation is a statement of the proceedings, and that the instrument was registered by consent of the parties, and that, by reason of the premises, the defendant became liable to pay the amount of the bill. This is nothing more than a conclusion of law from the premises; and, to warrant that inference, the plaintiff was bound to prove the acceptance of the bill. It is true that the plea of non-assumpsit is informal; it ought to have denied the acceptance of the bill, but it is now too late to take that objection. The only ground upon which the count can be supported is, that it is a count upon a bill of exchange; and then it was not proved.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

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## IN THE EXCHEQUER CHAMBER.

[IN ERROR.]

Sir HENRY HYDE NEPEAN, Bart., v. DOE, d. KNIGHT.

THIS was an action of ejectment, commenced in *Hilary* Term, 1834, to recover possession of copyhold premises in the parish of *Loders*, in the county of *Dorset*, (being the same premises claimed in the cause of *Doe* d. *Knight* v. *Nepean* (a),) and was tried before *Patteson*, J., at the *Dorsetshire* spring assizes, 1835, when the following evidence was given on the part of the plaintiff:—

2nd *January*, 1788.—At a court held this day for the manor of *Loders*, *Matthew Knight* took of the lord certain copyhold tenements, called the *Roofless Living* and *Home Living*, (being part of the premises in question in this cause,) to hold to him the said *Matthew Knight* and *Edward Knight*, (his brother,) and *Elizabeth Mary Davis*, for their lives, and for the life of the longest liver of them successively.

16th *October*, 1794.—At a court held this day, the said *Matthew Knight* took of the lord a certain copyhold tenement called *Mabys Hay*, (being other part of the premises in question,) to hold to him the said *Matthew Knight* and *Rice Davis Knight*, his son, for their lives, and the life of the longest liver of them successively, in reversion, immediately after the determination of the estate of *Henry Budden* therein.

20th *March*, 1797.—At a court held this day, *George Bagster* and *Nathaniel Taylor*, as assignees of the said *Matthew Knight*, a bankrupt, were admitted tenants to the said tenements called *Roofless Living*, *Home Living*, and *Mabys*

Where a party has been absent without having been heard of for seven years, the presumption of law then arises that he is dead; but there is no legal presumption as to the time of his death.

The doctrine of non-adverse possession is done away with by the 3 & 4 W. 4, c. 27, ss. 2, 3, except in cases provided for by the 15th section.

(a) 5 B. & Adol. 86.

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*Hay*, except out of the latter as to one close called *Sheep Acres*, to which they were admitted tenants in reversion of the said *Henry Budden*.

At the same court, *George Knight* took of the lord the reversion of the said tenements called *Roofless Living* and *Horne Living*, to hold to *Paul Slade Knight*, (the lessor of the plaintiffs,) and *Thomas Clothier Knight*, sons of the said *George Knight*, for their lives, and the life of the longest liver of them successively, after the determination of the estate and interest which the said *George Knight* claimed to have for the life of the said *Matthew Knight*, his brother.

And at the same court there was entered a letter of attorney, dated 13th March, 1797, whereby the said *George Bagster* and *Nathaniel Taylor* appointed *Richard Travers* their attorney to take admittance of the said tenements called *Roofless Living*, *Horne Living*, and *Mabys Hay*, together with the said close called *Sheep Acres*, and to surrender the same to the use of the said *George Knight*, his executors, administrators, and assigns, for the life of the said *Matthew Knight*.

In August, 1806, *Thomas Clothier Knight* died. In December in the same year, or early in 1807, *Matthew Knight* went to *America*, and, in the month of May, 1807, a letter was received from him, but he was never heard of afterwards.

*Matthew Knight* was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and, after that event, *George Knight* entered into possession of the same premises, as the purchaser of *Matthew Knight*'s interest, and continued in such possession till his death; but he was never actually admitted tenant to the lord.

On the 1st of August, 1807, *George Knight* executed an indenture of mortgage to the said *Richard Travers* of all the said premises, for the term of seventy years, if the said *Matthew Knight* should so long live, for securing the payment of two several sums of 838*l.* and 375*l.* Soon after the date of this mortgage, all the premises were sold to Sir *Evan Nepean*, the father of the defendant in this action, (the plaintiff in error,) but the purchaser was never admitted tenant to the lord; and if any formal conveyance was executed, it had been lost.

On the 12th December, 1807, *George Knight* died.

On the 6th April, 1808, Sir *Evan Nepean* granted a lease of the premises to the said *Richard Travers* for the term of fourteen years from this date, and *Travers* underlet the premises to *George Way*, who occupied them from the death of the said *George Knight*, in 1807, to the death of *Travers*, in 1813. Shortly after *Travers*'s death, the premises were surrendered by his executors to Sir *Evan Nepean*, who continued in possession thereof by himself or his tenants, from thence until his death, in 1822; and from that time to the present, the defendant, Sir *Molyneux Nepean*, has been in the possession thereof.

Upon these facts, two questions were raised at the trial; first, whether it was incumbent on the lessor of the plaintiff to prove that the said *Matthew Knight* was actually alive within twenty years next before the commencement of the action? secondly, whether it appeared, upon the evidence, that there had been an adverse possession of the premises against the lessor of the plaintiff for twenty years before the action brought? The learned judge stated his opinion to the jury, as to the first point, that it was incumbent on the lessor of the plaintiff to prove that *Matthew Knight* was actually alive within twenty years,

and that he had not proved it; and, as to the second point, that, if Sir *Evan Nepean* took as purchaser of the interest of *George Knight*, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether *Matthew Knight* was alive or dead, which was up to *May*, 1814. The jury found that *Matthew Knight* was not proved to have been actually alive within twenty years next before the commencement of the action, but that it did not appear, by the evidence, that there had been an adverse possession of twenty years as against the lessor of the plaintiff, and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned judge on the first point, and the defendant to his opinion on the second point; and cross bills of exceptions were tendered and sealed accordingly, and writs of error sued out thereon. The case was argued in last *Michaelmas* vacation, by

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Sir *W. Follett*, for the plaintiff in error.—In order to sustain his case, it was incumbent on the lessor of the plaintiff to shew, first, that *Matthew Knight* was dead; and, secondly, that the title fell on him in remainder within twenty years before the commencement of the action. It was contended, on the part of the lessor of the plaintiff, that, by analogy to the statute against bigamy, 1 Jac. 1, c. 11, s. 2, and the statute 19 Car. 2, c. 6, as to estates *pur autre vie*, that the presumption of the death of *Matthew Knight* did not arise until after the expiration of seven years from the time he was last heard of; that is, that he must be presumed to have lived to the end of those seven years. There can be no legal presumption as to the *time* of his death. In *Rex v. Inhabitants of Harborne* (a), on an appeal against an order of removal of a female pauper, the respondents having proved the settlement by marriage, the appellants shewed that the husband had been previously married; and that a letter had been written by his first wife, bearing date twenty-five days before the second marriage, from *Van Dieman's Land*. The sessions having, on this evidence, quashed the order of removal, the Court of King's Bench held, that they were warranted in so doing; for that they might presume the first wife was living at the time of the second marriage. In *Rex v. Twyning* (b), Lord Denman says, "I must take this opportunity of saying, that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances; such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe d. Knight v. Nepean*, the question arose much as in *Rex v. Twyning*. The claimant was not barred if the party was presumed not dead till the expiration of seven years from the last intelligence. The learned judge who tried the cause held, that there was a legal presumption of life until that time, and directed a verdict for the plaintiff; because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held, that no legal presumption existed, and set the verdict aside. I think the only questions in such cases are, what evidence is admissible, and what inference may be fairly drawn from it." *Patterson v. Black* (c), which has not been before referred to, was an action on a policy of insurance on the life of one *Maclean*, from the 30th *January*, 1772, to the 30th *January*, 1778: it appeared in evidence that, about the 28th *November*, 1777, *Maclean* sailed from the

(a) 2 A. & E. 540; 4 Nev. & M. 341.

(b) 2 B. & A. 386.

(c) Park. Ins. 644.

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Cape of *Good Hope* in the *Swallow* man-of-war, which, not being afterwards heard of, was supposed to have been lost in a storm off the *Western Islands*. In order to prove the death of *Maclean* before the 30th *January*, 1778, the plaintiff called witnesses to prove the ship's departure from the cape, and the several captains swore that they sailed the same day; that the *Swallow* must have been as forward in her course as they were on the 13th and 14th *January*, when they encountered a most violent storm; and that she was much smaller than their vessels, which weathered it with difficulty. Lord *Mansfield* left it to the jury to say, whether, under all the circumstances, they thought the evidence sufficient to convince them that the party died before the expiration of the time limited in the policy, adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have a verdict.

The general rule is, that no presumption arises as to the *time*, although it does as to the *fact*, of the death.

But then it is said, that as Sir *Evan Nepean* took as a purchaser from *George Knight*, his possession was not adverse so long as it was uncertain whether *Matthew Knight* was alive or dead. That Sir *Evan Nepean's* possession was not adverse to the tenant for life, is altogether immaterial; the moment he died, the possession became adverse to his remainder-man. The right of entry of the remainder-man accrued immediately on the death of the tenant for life. This question, then, resolves itself into the same as the former, namely, when did the death of the tenant for life occur? The statutes of limitation contain no reference to the doctrine of adverse possession. The 21 Jac. 1, c. 16, simply enacts, "that no person or persons shall make any entry into any lands, &c., but within twenty years next after his or their title, which shall first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made." Suppose, then, *Matthew Knight* died in 1808, the remainder-man would have had full right to enter at that time. The recent act for the limitation of actions, 3 & 4 W. 4, c. 27, does not alter the case. The 2nd section enacts, "that after the 31st *December*, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; and if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." And the 5th section enacts, "that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, such right shall be deemed to have first accrued at the time when it became an estate or interest in possession." Here the right of entry accrued, and the estate vested in possession, on the death of the tenant for life. No doubt there are instances in which a remainder-man may prevent the possession under the tenant for life from becoming adverse to himself, as in the case of a void lease for years by the tenant for life, and receipt of rent under it by the remainder-man. *Roe d. Brune v. Prideaux* (c), *Denn v. Rawlings* (d). But if there be no act shewing a recognition of the possession, the occupation is adverse

(c) 10 East, 158.

(d) 10 East, 261.

from the death of the tenant for life. The doctrine of adverse possession was adopted on the principle that the right of entry did not accrue until the occupation of the land became no longer permissive, as in case of landlord and tenant, or of trustee and *cestui que trust*. So in the case of a joint tenancy, or tenancy in common, or of a mortgagor in possession with the consent of the mortgagee. *Partridge v. Bere* (e), *Hall v. Doe d. Surtees* (f). Here it is evident there was no occupation by the consent of the remainderman. *Doe d. Parker v. Gregory* (g). If it were necessary to plead the Statute of Limitations specially, the lessor of the plaintiff would be bound to prove that his *right of entry* accrued within twenty years.

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The *Attorney-General*, *contrà*.—First, as to the question of adverse possession. This case does not fall within the 3 & 4 W. 4, c. 27. The 15th section of that act gives the further period of five years during which the doctrine of adverse possession was to remain as before. [*Patteson, J.*—That is where the possession was not adverse at the passing of the act.] Then how did the case stand under the old law? *Matthew Knight*, the tenant for life, having become bankrupt, his assignees convey his interest to *George Knight*; he mortgages to *Travers*; and *Travers* assigns his mortgage to Sir *Evan Nepean*, who becomes possessed of the equity of redemption as well as of the mortgage term. Sir *Evan Nepean*, therefore, represents *George Knight*, who represents *Matthew*. *George Knight* occupied the premises until December, 1807; *Hay*, (the tenant under *Travers*,) succeeded, and held till 1814; then came in the tenant of Sir *Evan Nepean*. Where the possession is at first lawful, by the party entering in his own right, it does not become unlawful by his continuance in possession after the period when he is in possession by right. *Hall v. Doe d. Surtees* (h), *Doe d. Colclough v. Hulse* (i), *Doe d. Souter v. Hull* (k), *Doe d. Smith v. Pike* (l), *Doe d. Roffey v. Harbrow* (m). *Doe v. Gregory* is distinguishable, as there the husband did not come in lawfully by right. [*Patteson, J.*—The whole of that case is, that there may be an unlawful possession which does not amount to an ouster.] There must be an ouster, an intention to disseise, otherwise there is no disseisin. *Reading v. Royston* (n). In *Doe d. Burrell v. Perkins* (o), a tenant for life leased for her life, and died in 1799, and the lessee continued in possession, without payment of rent, till his death in 1805, when his son took possession, and continued, without payment of rent, and, in 1807, levied a fine, with proclamations: it was held, that the remainder-man in fee might maintain ejectment against him without an actual entry to avoid the fine, or a notice to determine the tenancy; and Lord *Ellenborough* observed, “that, in order to constitute a title by disseisin, there must be a wrongful entry; but here there has been no wrongful entry, but only a wrongful continuance of the possession; therefore, there was no disseisin.” If, then, Sir *Evan Nepean* entered rightfully, without an intention to disseise, his continuance in possession did not cause the statute to run. Nor could his possession be adverse during the seven years while it was uncertain whether *Matthew Knight* was dead.

(e) 5 B. & A. 604.

(f) 5 B. & A. 687.

(g) 2 Adol. & E. 14; 4 Nev. & M. 308.

(h) 5 B. & A. 687; 1 D. & R. 340.

(i) 3 B. & C. 757; 5 D. & R. 650.

(k) 2 D. & R. 38.

(l) 3 B. & Adol. 738; 1 Nev. & M. 385.

(m) 3 A. & E. 68 n.; 1 Nev. & M. 422.

(n) Salk. 423.

(o) 3 M. & Sel. 271.

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Secondly, it is submitted, that the ordinary presumption of law, is, that a party lives during the period of seven years after he was last heard of. That presumption may be rebutted by circumstances, as by proof that the party was aged, or infirm, or exposed to extraordinary peril. Thus in *Patteson v. Black* there was a storm and probable shipwreck. In *Hatton v. King*, Lord *Ellenborough* proceeded on the rule adopted in insurance law, namely, that a vessel proved to have sailed, and not to have been heard of for several years, may be considered as lost. In *Doe d. George v. Jesson*, it was held, that the presumption of duration of life, with respect to which no account can be given, ends at the expiration of seven years from the time when the party was last known to be living. Against the lessor of the plaintiff the presumption is, that the tenant for life lived seven years from *May, 1807*; for him the presumption is, that he lived no longer. If it were otherwise, this absurdity would follow, that if *then* this ejectment had been brought within twenty years from *May, 1807*, it is admitted it might have been sustained; but if it had been brought within seven years from that period, the plaintiff must have been nonsuited. The demise might have been laid the very day after the expiration of the seven years, but not earlier. The 19 Car. 2, c. 6, enacts, that when *cestui que vies* shall absent themselves by the space of seven years together, they shall be accounted as naturally dead. [*Coleridge, J.*—The preamble shews that the inconvenience to be remedied was only the inability to prove the death.] *Rex v. Inhabitants of Harborne* only shews, that the law will presume that life continues for twenty-five days. It must be conceded that in *Rex v. Twynning*, there were conflicting presumptions, but the court admitted the existence of the presumption that life continues for seven years. [*Lord Denman, C. J.*—It is quite clear that the late statute does not apply.] It does not apply for two reasons: first, it is retrospective; secondly, this possession was not adverse.

*Barstow*, (in the absence of Sir *W. Follett*.) was heard in reply.

*Cur. adv. vult.*

In *Trinity* vacation, the judgment of the Court was delivered by

LORD DENMAN, C. J.—The lessor of the plaintiff claimed as grantee in reversion of a copyhold estate, on the death of *Matthew Knight*. *Matthew Knight* went to *America* in *December, 1806*, or early in *1807*, and the last account that was heard of him was by a letter written by him from *Charleston*, which was received in *England* in *May, 1807*. The declaration in this cause was served on the *18th January, 1834*. At the trial, evidence was given to shew that the defendant came into possession as a purchaser of the interest of *George Knight*, who held for the life of *Matthew Knight*.

Two questions arose. First, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of *Matthew Knight's* death, in order to shew that he had brought this action within twenty years of his death, or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which was within twenty years next before the com-

commencement of the action. Secondly, whether, on the supposition that the defendant came in as a purchaser of *George Knight's* interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned judge told the jury it was incumbent on the lessor of the plaintiff to prove that *Matthew Knight* was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely shewing, that seven years since he was last heard of expired within twenty years next before the commencement of the action; on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of *George Knight*, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether *Matthew Knight* was alive or not, which it was up to *May*, 1814. Upon this, the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that *Matthew Knight* was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years; and, under the learned judge's direction, they found their verdict for the lessor of the plaintiff.

It seems the statute of 3 & 4 Will. 4, c. 27, was not adverted to at the trial, but only on the case being argued before the Court. We are all clearly of opinion that the second and third sections of that act, (which came into operation on the 1st of *January*, 1834, seventeen days before this action was commenced,) have done away with the doctrine of non-adverse possession, and, except in cases falling within the fifteenth section of the act, the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession. The right of entry, in this case, accrued on the death of *Matthew Knight*. Then, as the first and second questions were identical, the learned judge was wrong in putting any distinct and separate question to the jury, on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law, at the time of the passing of that act, that is, on the 24th *July*, 1833. If that point had been raised at the trial, it is plain the jury would have been satisfied that the possession was adverse on the 24th *July*, 1833; for we know, by the report of *Doe d. Knight v. Nepean*, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 Will. 4, c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered, was therefore wrong.

Still it is necessary to determine the first and principal point in the case, because, if the learned judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The Court is therefore called on to review the decision of the Court of King's Bench in *Doe v. Nepean*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or at any particular period during those seven years; that if it be important to any one to establish the precise time of such person's

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death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of opinion, that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I., relating to bigamy; more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, but not at the *time*; it is conformable also to decisions on questions of bigamy and on policies of insurance, and it is supported and confirmed by the case of *Rez v. Inhabitants of Harborne*. It is true, the law presumes that a person shewn to be alive at a given time, remains alive until the contrary be shewn, for which reason, the onus of shewing the death of *Matthew Knight*, lay, in this case, on the lessor of the plaintiff. He has shewn the death by proving the absence of *Matthew Knight*, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of *Matthew Knight*. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death, seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven years commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule, that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be re-

ferred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion, that the learned judge's directions to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but, as we cannot order it be so entered, the result is, that the verdict found for the lessor of the plaintiff must be set aside, and a *venire de novo* awarded.

*Venire de novo* awarded.

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END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

C O U R T O F E X C H E Q U E R,

IN

Michaelmas Term, 1837.

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The ATTORNEY-GENERAL v. CATT.

The defendant agreed, at *Rye*, to take a vessel for the purpose of meeting, on the high seas, a ship from *Holland*, and receiving on board, from the latter, a quantity of contraband tobacco, intended to be smuggled into *Ireland*. This he accordingly did, and the cargo was ultimately landed at *Youghal*. Held, that defendant was liable to penalties within the 3 & 4 W. 4, c. 53, s. 44; and that the transshipment of the goods from the foreign vessel, constituted an illegal unshipment within the statute. Held, also, that the venue was properly laid in *England*.

THIS was an information filed by his majesty's attorney-general, to recover penalties against the defendant, under the 3 & 4 Wm. 4, c. 53, s. 44, which provides, "That every person who shall, either in the United Kingdom or the Isle of *Man*, assist or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the United Kingdom, or into the Isle of *Man*, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which shall have been illegally unshipped without payment of duties, or which shall have been illegally removed, without payment of the same, from any warehouse or place of security in which they may have been deposited, or any goods prohibited to be imported, or to be used or consumed in the United Kingdom, or in the Isle of *Man*, and every person either in the United Kingdom or the Isle of *Man*, to whose hands and possession any such uncustomed or prohibited goods shall knowingly come, or who shall assist or be in any wise concerned in the illegal removal of any goods from any warehouse or place of security in which they shall have been deposited as aforesaid, shall forfeit either the treble value thereof or the penalty of 100*l.*, at the election of the commissioners of his majesty's customs."

It appeared at the trial, before Lord *Abinger*, C. B., at the *Middlesex* sittings after last *Hilary* Term, that the defendant, who was the captain of a ship called the *Hope*, belonging to *Rye*, had agreed with a person of the name of *Moylan*, to assist in smuggling tobacco into *Ireland*. The defendant was ordered to proceed to *Hull*, and sail from thence, ostensibly, to *Neath*, in *Glamorganshire*; and it was arranged that, off the coast of *Suffolk*, he was to receive, from a *Dutch* vessel, despatched by *Minter*, an agent of *Moylan* at *Flushing*, the contraband tobacco; thence to sail for *Neath*, to take in culm, for the purpose of covering the tobacco, and to proceed with his cargo to *Youghal*, in *Ireland*. The defendant, accordingly, received on board, from the *Dutch* ship, 330 bales of tobacco, in packages of 60*lb.* each, and, after taking in the

culm, at *Neath*, proceeded to *Youghal*, where he landed the cargo on the 13th of *February*, 1834.

It was objected, by the defendant's counsel, that the information ought to have been tried in *Ireland*, as the unshipping took place there. The point being reserved, a verdict passed for the crown. *Jervis*, in *Easter* term, moved to set aside the verdict, and having obtained a rule, cause was shewn in *Trinity* Term by,

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The *Solicitor-General*, *Tancred*, and *Kaye*.—The defendant is within the provisions of the act, either as harbouring and concealing the goods at *Neath*, or for unshipping them at sea, from the *Dutch* vessel into his own. This is shewn by *The Attorney-General v. Tomsett (a)*, which has decided, that taking goods on board a vessel at sea, is an illegal unshipment. The Court then called upon

*Jervis*, for the defendant.—The case of *Attorney-General v. Tomsett* does not apply. The unshipping at sea cannot bring the defendant within the words of the act, which uses the words "for which the duties have not been paid." As it was impossible that duty could be paid at sea, it makes no matter whether they were unshipped or not, as the clause as to the payment of duties, shews that there can be no violation of the law until the goods arrive at their port of discharge, where such duties would be payable. The entire clause contemplates goods unshipped without payment of duty, and shews that it must be an unshipping within the district where the duties attached, which alone can render the defendant liable. Neither can this be called "a harbouring of goods which were imported into the United Kingdom." The ship did not go into *Neath* for the purpose of importing the goods; on the contrary, it was merely to procure culm, to conceal the illegal cargo. What is the meaning of the word "importing?" Does going into port for a further cargo, or in distress, mean an importing? In *Hale's Treatise on the Customs*, cap. 20; *Harg. Law Tracts*, p. 216, it is said—"The duty is not due merely by coming into an *English* port; for so he might do for safeguard, or to stay for a wind, and yet without any intention of merchandize; and the customs are due only from such goods as are imported for merchandize, and not otherwise." This case precisely resembles that of the *Attorney-General v. Kenifick (b)*.

*Solicitor-General*, *contrà*.—Either the tobacco could or could not be imported; now as this tobacco was in packages *prohibited* to be imported, the offence of the defendant, which is the unshipping of goods prohibited to be imported, is clearly within the statute.

*Cur. adv. vult.*

The judgment was now delivered by

Lord ABINGER, C. B.—The third count of the information charges the defendant with penalties of treble the value of a quantity of foreign tobacco, which it is alleged he was, at *Ratcliffe*, in the county of *Middlesex*, concerned in unshipping, the same being goods prohibited to be imported into the United Kingdom. The facts of the case are these:—

The defendant was the master of a vessel, called the *Hope*, belonging to the

(a) 2 C., M., & R., 170.

(b) Ante, p. 215.

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port of *Rye*. At *Rye*, and also in *London*, he held consultations with a witness of the name of *Moylan*, with whom he agreed, in consideration of receiving 550*l.*, part of which, 50*l.*, was paid in hand, to take his vessel to *Hull*; to correspond, from thence, with a person of the name of *Minter*, at *Flushing*, then to take his vessel near to the coast of *Holland*, and to receive from a vessel, which *Minter* was to despatch for that purpose, a number of bales of tobacco; then to proceed to *Neath*, in *Glamorganshire*, to receive on board a cargo of culm, which was to be laid over the tobacco, for the purpose of concealing it, and then to take the cargo of tobacco, in that vessel, to *Youghal*, in *Ireland*.

This agreement was executed. The defendant went with the vessel to *Hull*; he wrote to *Minter*, he then sailed in ballast, ostensibly for *Neath*. On the high seas, off the coast of *Holland*, he received on board the *Hope*, from a Dutch vessel, 330 bales of tobacco, 60*lb.* in each bale, and concealed them under the ballast. He went first to *Yarmouth Roads*, in the Isle of *Wight*, where the vessel was overhauled by revenue officers, who, however, did not discover the tobacco; from thence he sailed, in the vessel, to the port of *Neath*; lay there a considerable time, took in the cargo of culm, placed that over the tobacco, sailed to *Youghal*, in *Ireland*, and there landed the tobacco.

It has been objected, by the counsel for the defendant, that the only act of unshipping this tobacco was in *Ireland*, where, of course, in that case, the information ought to be tried; to which it was answered, that the transhipping it, from the Dutch vessel in the *Hope*, on the high seas, with intent to take it to *Neath*, and afterwards to *Youghal*, in *Ireland*, where it was to be landed, was an unshipping within the meaning of the stat. 6 Geo. 4, c. 108, s. 45, and that the defendant was concerned, in *England*, in that unshipping. It is by that section enacted, "that any person who shall, either in the United Kingdom, or in the Isle of *Man*, assist or be otherwise concerned in the unshipping of any goods which are prohibited, or the duties of which are not paid or secured, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the commissioners of his majesty's customs;" and it is averred, in the information, that the commissioners of customs have elected to proceed for the treble value.

The tobacco in question was prohibited to be imported, being packed in bales of 60*lb.* each, whereas the statute 6 Geo. 4, c. 107, s. 52, (in the table,) prohibits its importation unless in hogsheads, casks, chests, or cases, weighing 450*lb.*; if from the *East Indies*, the weight required is 100*lb.* The question for the consideration of the Court is, whether the defendant, having at *Rye* and in *London* arranged this plan, which he afterwards executed to the very letter, has or has not, in *England*, been concerned in the unshipping of goods which were prohibited—which were intended to be, and which were, brought by him into the United Kingdom; first into *Neath*, in *Glamorganshire*, and afterwards into the port of *Youghal*, in *Ireland*, where they were actually landed by the defendant himself. The act of parliament has not required that the unshipping should be within the United Kingdom; the offence consists in being, within the United Kingdom, concerned in unshipping. The case of *The King v. Tomsett*, which was decided in this court, in *Easter Term*, 1835, involved this very question. In that case the defendant, at *Dover*, hired a *Dover* hoy, to meet, in her voyage to *London*, a boat from the *French* coast, with a cargo of foreign silks, which he was to receive on board the hoy, and to convey

to *London*, concealed under the ballast. The *Dover* hoy did meet that boat accordingly, about two miles from the shore, within limits which commissioners appointed under the stat. 13 & 14 Car. c. 11, had assigned to the port of *Dover*. She received the silks from that vessel, and brought them into the port of *London*, where they were discovered and seized. The Court decided that the defendant, having made the arrangement at *Dover*, was concerned in the unshipping, and that the unshipping from the *French* boat to the hoy, with a view to their being laid on land, was an illegal unshipment within the meaning of this act of parliament, without any reference to the limits of the port of *Dover*. And the Court see no reason to differ from that judgment.

The principle in this case is the same. Whether the unshipping be from a small to a large vessel, or from a large to a small vessel, or from a vessel into the sea, which in the case of tubs of liquor is of frequent occurrence, cannot make any difference. Whether the unshipping be within two miles of the *English* coast, or whether it be within two miles of the coast of *Holland*, cannot make any difference. In any case the act is on the high seas, and without the limits of any *English* county. We are, therefore, of opinion, that the unshipping, in this case, is an unshipping within the meaning of the act of parliament; and this rule must be discharged.

Rule discharged.

### LUCE v. IRWIN.

IN this case, *Humphrey* moved to enter an *exonereter* on the bail-piece on the ground of a variance between the affidavit to hold to bail and the declaration.

The affidavit described the cause of action as a bill accepted by the defendant, payable to one *Flaherty*, delivered by the defendant to *Flaherty*, and by him indorsed to the plaintiff; in the declaration it was stated that the bill was accepted by the defendant in favour of *Flaherty*, indorsed by *Flaherty* to one *Iles*, and by *Iles* indorsed to the plaintiff.

*Humphrey* contended that this was a variance, and relied upon the judgment of Lord *Kenyon*, C. J., in the case of *Wilks v. Adcock* (a); and also upon the fact that the Courts, where bail were to be exonerated, would give relief for the slightest variance such as even a mistake in a name.

LORD ABINGER, C. B.—This is no variance; in point of substance, as far as the legal liability is affected, the statement in the affidavit and in the declaration are the same.

PARKE, B.—In the case of *Mills v. Adcock* the bill was described as a bill or order for the payment of money, but all mention of the order was omitted in the declaration, and this the Court considered a variance. Even with this qualification that case is difficult to be supported.

The rest of the Court concurring, the

Rule was refused.

(a) 8 T. R. 17.

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An affidavit to hold to bail, described the cause of action as a bill accepted by the defendant, delivered by him to F., and indorsed by F. to the plaintiff. The declaration stated the bill to have been accepted by the defendant, delivered by him to F., indorsed by F. to E., and by E. indorsed to the plaintiff. Held, no variance.

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BLESSLEY v. SLOWMAN.

The plaintiff had been arrested by the defendant in two actions. In one of the actions, the defendant had received authority to discharge him out of custody, but detained him for an hour. *Held*, that as there was no proof that he was detained longer than the defendant was justified in detaining him on account of the other action, that no action lay against the defendant for false imprisonment.

TRESPASS for false imprisonment against the defendant who was a sheriff's officer. *Pleas*.—1. Not guilty. 2. Justification under a writ sued out by one *Price*. The plaintiff new assigned. To this the defendant pleaded, 1. Not guilty; 2. A justification under a writ at the suit of a person of the name of *Lewis*. *Replication de injurid*. It appeared, at the trial, before Lord Abinger, C. B., at the sittings after last Trinity Term, that while the plaintiff was in custody, under the two writs mentioned in the pleadings, it was communicated to the defendant, by *Lewis*, that his demand had been paid, and that the action upon which the plaintiff was arrested at his suit, had been settled, and *Lewis* accordingly directed his discharge. This fact had not been communicated, by the defendant, to the plaintiff. The plaintiff shortly after executed a bail-bond in *Price's* action, and the defendant also required him to sign what purported to be a bail-bond in *Lewis's* action, but from some informality could not amount to such, and upon so doing he was discharged. It did not appear that the plaintiff was detained any longer than was justifiable under *Price's* action. The lord chief baron having been of opinion, at the trial, that there was no proof of the plaintiff having been kept in custody any longer time than the defendant could justify under the writ at the suit of *Price*, nonsuited the plaintiff.

*Jervis* now moved to set aside the nonsuit and enter a verdict for the plaintiff, and contended that the defendant having called upon him to sign the supposed bail-bond in *Lewis's* action, amounted to an imprisonment, as it was his duty, upon the execution of the bail-bond in *Price's* action, to have dismissed him.

LORD ABINGER, C. B.—It is as old as Lord Coke that a man may assign one reason for an act and in pleading justify for another; and upon proof of the existence thereof at the time, he will have an answer to an action. That is precisely the present case.

PARKE, B.—I think the nonsuit right. I am also of opinion that the plea covers the detainer. There is no proof he was in custody a longer time than the defendant was justified in keeping him under *Price's* writ. It is incumbent on plaintiff to shew that he was detained for a longer time.

Rule refused.

## PRIESTLEY v. FOWLER.

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**CASE.** The declaration stated that the plaintiff was a servant of the defendant, in his trade of a butcher: that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant's, in a certain van of the defendant, then used by him and conducted by another of his servants, in carrying goods for hire, upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed, by the said van, with the said goods; and it became the duty of the defendant, on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby; in consequence of the neglect of all and each of which duties, the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, &c. *Plea*—Not guilty.

At the trial, before *Park, J.*, at the summer assizes for the city of *Lincoln*, it appeared that the defendant was a butcher and the plaintiff was his servant. The defendant ordered the plaintiff to convey certain quantities of meat to *London*, which were placed in a cart of the defendant. The plaintiff remonstrated, on account of the cart being overloaded, and too weak to bear the load, and it being dangerous to go by it. The defendant answered—"You are a fool," or words to that effect, "get up." The plaintiff accordingly mounted, and when near *Peterborough* the cart cracked; the plaintiff still continued his journey, till at length the cart broke down, and the plaintiff's leg was broken. To recover damages for this injury, the present action was brought. The jury found a verdict for the plaintiff. *Adams, Serjt.*, in the course of the last term, obtained a rule to arrest the judgment, on the ground that there was nothing in the declaration to throw any liability on the master; and also for a new trial. The latter branch of the rule he now abandoned, as the defendant had become bankrupt since the last trial. The arguments, therefore, were solely confined to the motion in arrest of judgment.

*Goulbourne, Serjt.*, and *N. R. Clarke*, shewed cause.—The ground on which it will be contended, on the other side, that the defendant is not liable, is, that there is nothing on the face of the declaration to show that it was the plaintiff's duty to go in the van. On the day in question, the defendant ordered the plaintiff to go with the van. [*Parke, B.*—The doubt is, whether he was in the van by his master's orders.] After verdict, it must be intended he was to go in the van. The declaration itself states—"he was to go with and take the goods of the defendant in and by the van;" and, moreover, "that the plaintiff, by the desire and at the command of his master, was being carried in the van." It was part of the plaintiff's duty that he was to be carried by the van on his journey. Even if the statement were more ambiguous, the real question is, whether, after verdict, sufficient is not stated. It is true this is so far a case of the first impression, that there is no precedent exactly in point; still there is no difference between this and the case of an ordinary coach pas-

In an action on the case, the declaration stated that the plaintiff was a servant of the defendant, in his trade of a butcher, and that the defendant ordered the plaintiff, as such servant, to take certain goods of the defendant in a van, driven by another servant of the defendant; that the plaintiff was accordingly being conveyed by the said van, with the said goods, and it became the duty of the defendant to use due and proper care that the said van should be in a proper state of repair, and that it should not be overloaded, and that the plaintiff should be securely carried thereby; nevertheless that, in consequence of the defendant's want of care, the van broke down, and the plaintiff's leg was broken. *Held*, on motion in arrest of judgment, that the declaration was insufficient, as there was nothing in it to shew that the defendant was liable by law.



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senger. [Lord *Abinger*.—There is this distinction : the coach passenger has no means of knowing the state of the coach, the servant has. Suppose this case: a master, knowing a room to be infectious, puts a servant to sleep there, and the servant incurs a disease, the master would clearly be liable; but it would be otherwise if he had put him in a room where the windows were broken, and the place otherwise so obviously ruinous, as that he himself could actually see its condition; in the latter case you would hardly say that the master would be liable for an injury that resulted to the servant.] The passenger by a coach, it is true, pays money; the servant pays by his services; it is, therefore, part of the master's contract, that he will not expose him to risk in performing these services, which are as good a consideration as the payment in money by a coach passenger. After verdict, it must also be intended, that the master knew the van was overloaded. If, therefore, a master orders a servant to go on a van which he knows to be overloaded, if the van breaks down, is he not entitled to protection equally with a passenger, each giving a consideration, although of a different kind? Suppose the master knowingly overloads the van, and the servant makes an objection to go on it, and the master orders him to go on, and the cart breaks down; can the master say, you knew the risk; it was your own fault? After verdict, it must be intended it was the master's duty to provide a proper vehicle. Besides, the present case stands thus: a master orders a servant to do an act, the servant remonstrates, the master insists, and the servant complies; can the master turn round and say, you knew the danger, and did the act with your eyes open? [Lord *Abinger*.—If the master undertook it was sufficient, and made a promise to that effect, I should then consider him liable.] This would be intended after verdict, If this had been *assumpsit*, the law would raise a promise co-extensive with what the declaration states to be the duty. [Lord *Abinger*.—That is, if you shew a duty, the law will imply a promise. I can conceive two cases in which an action would be maintainable; one, where the master maliciously designed to injure the plaintiff; the other, where he positively guaranteed the safety of the servant.] After verdict, it will be intended that the master was aware of the danger, and that he denied to the servant that there was any danger, and, in fact, that the servant did not know of the danger. [*Parke*, B.—Suppose I send my servant on the roof, to clear away the snow; if the roof gives way am I liable?] The present case differs; it is not a mere state of insufficiency; for the overloading of the cart is a positive act, which occasions the accident. Moreover, it appears, by the declaration, that he rode on the van by the command of his master. It is left equivocal, in the declaration, whether he knew the state of the van. It is to be inferred, from the declaration, that his master knew of the danger, and, according to a well-known rule, even equivocal words will be construed so as to uphold the verdict.

*Adams*, Serjt., *contra*.—This action is case, not *assumpsit*, and herein there is an essential difference. [*Parke*, B.—No doubt there is here an implied contract between master and servant; to what extent is the question.] Case will not lie unless on a common-law liability. Is this such? If the liability arose from a special agreement other than at common law, *assumpsit* ought to have been the form of action. In order to make the present action maintainable, five circumstances must concur. First, that the van was overloaded, by defendant's order. Second, that plaintiff was ignorant of its being so over-

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loaded. Third, there must be an order by defendant, to plaintiff, to go on the van. Fourth, that it was necessary for the plaintiff to do so, in order to perform his duty in respect of the goods. And, fifth, that the order shall be a lawful command which the servant is bound to obey. Even supposing it true that the van was overloaded, by the order of the defendant, there is no expression by which we can gather, from the declaration, that the plaintiff was ignorant of it; we could not, therefore, deny that which did not appear on their declaration. Then as to the necessity of going in the van, where is the statement to warrant such a construction? [*Parke, B.*—They have removed my difficulty as to that point. The word “in” may cover both the taking of the goods, and the mode of the plaintiff’s going, and it is afterwards positively averred, he was *in* the van by the command of the defendant. *Lord Abinger, C. B.*—The words are *in* and *by* the van. The latter statement, above referred to, interprets the ambiguity.] Then as to the consideration of the fourth point. It must fall fairly within the scope of the servant’s duty to ride in the van, and it must also be necessary to do so, in order properly to perform that duty. Is that so in this instance? The substance of the command clearly is to take the goods to *London*: the mode is by going in the van; now, unless going *in* the van is necessary, in order to take the goods to *London*, it forms no part of the command. The common-law liability could only arise on a command, the whole of which is necessary. [*Lord Abinger, C. B.*—If he is a servant, he must obey all lawful commands. It was a lawful command to take goods to *London*. *Parke, B.*—You cannot intend a violation of law until it is proved.] Still, on the face of the declaration, there must be an averment, that it was necessary for him to go *in* the van, and that the command was lawful, neither of which appears on this declaration. The adjunct “to go in the van,” ought to be averred as a necessary part of the duty, and a lawful command. And, even supposing all the five points to have arisen, this is not a common-law liability, but is in the nature of a contract, and, as such, ought to have been shaped in assumpsit.

*Cur. adv. vult.*

*LORD ABINGER, C. B.*—This was a motion in arrest of judgment, after a verdict for the plaintiff, upon the insufficiency of the declaration. [His lordship, after stating the declaration, proceeded thus:] It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; in other words, that from the mere relation of master and servant, no contract, and therefore no duty, can be implied, on the part of the master, to cause the servant to be safely and securely carried, or to make the master liable for damages to the servant, arising from any vice or imperfection unknown to the master, in the carriage, or in the mode of loading or conducting it; for, as the declaration contains no charge that the defendant knew any of the defects mentioned, the Court is not called upon to decide how far such knowledge on his part, of a defect unknown to the servant, would make him liable. It is admitted, that there is no precedent for the present action by a servant against a master. We are, therefore, to decide the question upon general principles, and, in doing so, we are at liberty to look at the consequences of a decision the one way or the other. If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is

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responsible by his general duty, or by the terms of his contract, for all the consequences of negligence, in a matter in which he is principal, is responsible for the negligence of all his inferior agents. If the owner of the carriage, therefore, is responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who stands behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for the drunkenness, neglect, or want of skill in the coachman. Nor is there any reason why the principle should not, if applicable to this class of cases, extend to many others. The master, for example, would be liable to the servant, for the negligence of the chambermaid, in putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby the servant was made to fall down, while asleep, and injure himself; for the negligence of the cook in not properly cleansing the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to health; of the builder for a defect in the foundation of the house, whereby it fell and injured both the master and servant in the ruins. The inconvenience, not to say the absurdity, of these consequences, afford a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of master and servant never can imply an obligation, on the part of the master, to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known, as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail, would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him; and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain, by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford. We are, therefore, of opinion, that the judgment ought to be arrested.

Rule absolute.

## BACON v. SIMPSON.

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**A**SSUMPSIT. The declaration stated, that the plaintiff at the time of making of the agreement with the defendant hereinafter mentioned, was lawfully possessed, that is to say, for the residue of a term of six years, of and in a certain dwelling-house and premises, &c., and also of certain household-furniture, tenant's fixtures, chattels, and other effects, *then being on the said premises*; and thereupon, on the 9th of *November*, 1836, by a certain agreement, made between the plaintiff of the one part, and the defendant of the other part, it was agreed that the plaintiff should sell and assign the said lease, with the outbuildings and premises, for the sum of 200*l.*; and the plaintiff thereby agreed to sell the defendant all her household-furniture, tenant's fixtures, horses, carriages, hay, corn, implements, and effects, *then on the said premises*, which she might have a right to sell, at a fair valuation to be made by two appraisers; and the plaintiff agreed, that possession of the premises should be given to the defendant on or before the first day of *January* then next, on being paid the aforesaid premium for the lease, and for the goods, fixtures, stock in trade, and effects; and the defendant agreed to purchase the said lease and the said household furniture, tenant's fixtures, &c., and to take possession and pay for the same on or before the said 1st day of *January*. And the said parties thereby mutually agreed, that if either of them should make default, he should pay to the other the sum of 500*l.*, as or in nature of liquidated damages. The declaration then stated, that, after making the agreement, and before the said 1st day of *January*, to wit, on the 31st day of *December*, 1836, by a memorandum indorsed on the back of the before mentioned agreement, it was agreed between the parties, in consequence of the said 1st day of *January* being inconvenient, to postpone the completion of the said agreement until the 6th day of *January*. The declaration then averred, *that, from the time of making the agreement, hitherto, the plaintiff was ready and willing to assign and convey her interest in the premises, &c., and to assign and deliver to the defendant her household furniture, fixtures, horses, carriages, hay, corn, implements, and effects, as aforesaid, at a fair appraisement, and to deliver possession, and complete and fulfil the said agreement, upon the 5th day of January.*

*Breaches assigned, in non-payment of the premium, &c.*

*Pleas*—1st. That the plaintiff was not possessed of the said dwelling-house and premises, household furniture, tenant's fixtures, chattels, and other effects or any part thereof, in manner and form, &c.

2ndly. That the plaintiff was not ready and willing to assign and convey the estate and interest which she had in the said dwelling-house and premises at the time of the making the said agreement.

*Assumpsit.* The declaration stated that the plaintiff was lawfully possessed of a certain dwelling-house and premises, &c., and also of certain furniture, tenant's fixtures, &c., then being on the said premises, for the residue of a term of six years; and that the plaintiff agreed to sell and assign the said lease, with the outbuildings and premises, at a certain sum; and all the household furniture, &c., then on the said premises, at a fair valuation; and that possession should be given to the defendant on or before a certain day. It then averred, that from the time of making the agreement, the plaintiff was ready and willing to transfer the household furniture, &c. This averment was traversed. It appeared that on the day upon which the agreement was entered into, the house, together with the furniture, was destroyed.

*Held*, that upon this issue the plaintiff could not recover.

By an indorsement on the agreement the day for delivering the possession was enlarged. *Held*, that such indorsement constituted a fresh agreement: but *quære*, per *Parke, B.*, whether it was of the value of 20*l.*, so as to require a stamp.

The plaintiff, who was widow of the former lessee, took out administration subsequent to the date of the agreement, and before the day appointed for the delivery of possession. *Held*, that the taking out of administration had no relation back, so as to give the plaintiff title at the date of the agreement. But *semble*, that if the plaintiff could make title at the time appointed for performing the contract, an issue found that she was not possessed at the date of the agreement, was immaterial.

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3rdly. That the plaintiff was not ready and willing to assign and deliver to the defendant her household furniture, tenant's fixtures, horses, carriages, hay, corn, implements, and effects.

4thly. That the plaintiff was not ready and willing to deliver possession, and to complete and fulfil the said agreement, according to the effect and meaning thereof, in manner and form, &c.

At the trial before Lord Abinger, C. B., at the *Middlesex* sittings after *Trinity* Term, the agreement dated the 9th of *November*, together with the indorsement thereupon for postponing the time for delivering up possession until the 6th of *January*, as stated in the declaration, was proved.

It appeared that the plaintiff had not taken out administration until the 31st of *December*: and also that upon the evening of the 9th of *November*, a great portion of the premises were destroyed by fire, together with the furniture and effects. Three objections were taken by the defendant's counsel. 1st, that the indorsement amounted to a new agreement, and therefore required a stamp. 2nd, that at the time of the agreement the plaintiff had no interest in the subject-matter thereof; and 3rdly, that by the terms of the lease under which the plaintiff held, a license to underlet was necessary, and that none was proved. On this last point the lord chief baron directed a nonsuit.

*Kelly* moved, in this term, for a rule to shew cause why the nonsuit should not be set aside; and having obtained it,

*Thesiger* and *Ogle* shewed cause.—It is unnecessary to consider this question otherwise than by shewing that the plaintiff was liable to be nonsuited; and if this shall appear to be the case it will form an answer to the motion for a new trial.

And first as to the issue upon the possession of the plaintiff. The plaintiff, having accepted an issue upon her possession upon the day on which the agreement was made, is bound to prove that fact. It appeared that at the time of making the agreement she had not taken out letters of administration; and as by law, the taking out of letters of administration does not vest the property by relation in the same manner as the grant of probate to an executor, it is clear the plaintiff was not possessed at the time. In *Doe d. Hornby v. Glenn* (a), it was held that an agreement entered into by a person as administrator *de son tort*, did not bind him after he had taken out letters of administration: which shews that the grant of administration confers no title by relation. In *Middleton's case* (b), it is said, "If A. releases and afterwards takes administration, it should not bar him, for the right of the action was not in him at the time of the release." It may be considered that the possession of the plaintiff might have been sufficient as against a wrong-doer; here, however, the case is different, being a case of *contract*. [*Parke*, B.—She might, by stating that she was entitled as administratrix and about to take out letters of administration, have enabled herself to answer the plea.] The case of *Carvicke v. Blagrove* (c), shews that an averment of this kind, as to possession, is material and traversable. As to the second point, the first count of the declaration having stated the inconveniences of giving possession on the

(a) 1 Ad. & E. 49.

(b) 5 Coke, 28.

(c) 4 Moo. 303.

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1st of *January*, went on to aver the substituted agreement. In proof of this the original agreement was produced, having an indorsement, stating the postponement of the time. To this it was objected, that the memorandum so indorsed constituted a new agreement in point of fact; and, notwithstanding that the original agreement was properly stamped, it was objected to as requiring a fresh stamp before it could be received in evidence. *Reed v. Deere* (d). In *Stephens v. Lowe* (e), where, on the fly-leaf of an arbitration-bond, there was an indorsement bearing date after the time limited by the bond for making the award, and stating that the parties within-named had met that day by consent, it was held, that this memorandum being evidence of a new agreement to refer, was not admissible in evidence without a fresh stamp. Lastly, it was in evidence that on the day upon which the agreement was signed, the premises were burnt down, and a greater part of the furniture destroyed. It was out of the plaintiff's power, therefore, to assign all the furniture and other matters included in the agreement on the day appointed. It was indeed contended that the defendant, having proceeded with the negotiation after the fire, had waived this difficulty. That, however, ought to have been made the subject of a special replication. The issue here is joined on her readiness and willingness, to assign and convey all the stipulated articles, on the day mentioned; it was incumbent, therefore, upon her to shew an offer, at least, to do so. In *Stent v. Bayliss* (f), the Master of the Rolls, puts this case, "If I should buy a house, and before such time, as, by the articles, I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house." [Lord Abinger, C. B.—That must mean before the completion of the contract.] Even so; here also the articles in question continued to be the plaintiff's property; she must, therefore, bear the loss. [Parke, B.—She cannot recover, hers being an entire contract; her words are, the effects "then on the premises;" they have been burnt, and she is, therefore, incapacitated from performing her contract.] In *Zagury v. Furnell* (g), it was held, that goods sold remain at the risk of the seller, while any thing is to be done to them to ascertain the amount of the price. So also in *Rugg v. Minett* (h). Here the property remained in the plaintiff until the goods were valued; she must therefore bear the loss.

*Kelly, contra*, was directed to confine himself to the 2nd and 3rd points.—The indorsement required no stamp. The substance of the agreement to be performed is the same; there is no alteration except in the enlargement of the time. If a stamp is necessary in the present case, it will be equally so, in all cases where an arbitrator to whom power is not given by the submission, enlarges the time for making his award by the consent of the parties, yet this is never done. There is a manifest distinction between an enlargement *before* and *after* the time for the making of an award has expired. If the enlargement is *after*, it is clearly a new agreement, and therefore requires a stamp, and that was all that is determined by *Stephens v. Lowe*. [Parke, B.—I cannot see what difference it can make in point of law, whether the enlargement is *before* or *after* the expiration of the time. It is equally an agreement, and if of the value of 20*l.* will require a stamp.] At all events

(d) 7 B. & C. 261.  
(e) 2 M. & Scott, 44.  
(f) 2 P. Wms. 220.

(g) 2 Campb. 240.  
(h) 11 East. 210.

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it cannot be said, that the subject matter of this agreement is of the value of 20*l.* There is no difference in the subject of the agreement, and how is the value of the delay to be estimated? This is a question on the stamp laws, and therefore the Court will construe it strictly. Here is no indulgence to one party at the expense of the other; it is a mere collateral accommodation, which may not be of the value of 20*l.* [*Alderson, B.*—In *Kensington v. Inglis* (i) an alteration on a policy would have been subject to a stamp, only for the express provision of the statute 35 Geo. 3, c. 63. *Lord Abinger, C. B.*—It is stipulated, in the agreement, that there was to be a penalty incurred, by reason of the non-performance of the contract; the measure of the value of the agreement, to postpone the time, will be the amount of the penalty.] If 40*l.* were the deposit to be paid, and by a subsequent agreement 5*l.* were to be waived, would that require a new stamp? [*Alderson, B.*—This is a different case, for it is an agreement to convey all the property on a different day.] Secondly, as to the objection arising from the burning of the premises: the agreement was made on the 9th of *November*; the fire took place the same day; the parties still proceeded as if no loss had occurred. It ought, therefore, to have been left, as a question to the jury, whether in this case there was not a new agreement between the parties to contract for what remained upon the premises. [*Parks, B.*—It might be evidence for a jury on a new agreement that he had waived his objection, but here you have declared on the old agreement.

*LORD ABINGER, C. B.*—I think the plaintiff was properly nonsuited. It was the duty of the plaintiff, consistently with the present state of the record, to prove a performance of her contract, which was to deliver all the effects then upon the premises. What has been urged by the plaintiff's counsel is mere matter of evidence to support a new contract, if such had been declared upon. By the present pleadings, however, the plaintiff is bound to a strict performance of the original agreement. On the second point, I am also strongly inclined to think, that there was a new contract, and that, therefore, there ought to have been a new stamp.

*PARKE, B.*—I am also of opinion that the nonsuit was right. As to the first question, I think that the allegation that the plaintiff was possessed, at the time of the agreement, has not been proved. It may, however, be a question, whether such an issue is material, the real question being, I apprehend, whether the party contracting could make a good title at the time when the contract was to be carried into effect. As to the second point, I certainly think there was an agreement: but my doubt is, whether such agreement was of the value of 20*l.*? I, therefore, do not pronounce upon it; but, certainly, I should not be inclined to nonsuit upon that ground alone. As to the third objection, I think, decidedly, it ought to prevail. She has not made out the issue that she was ready and willing to deliver all the effects upon the premises at the time of sale. The original agreement, upon which the present declaration is framed, is clearly applicable to all the fixtures, implements, &c. then on the premises, for which the defendant was to pay at a valuation. The declaration, after stating the enlargement of time, avers her readiness and willingness to convey, in terms as large as the original agreement. The

(i) 8 East, 273.

plaintiff was, therefore, bound to maintain that issue. How does she do so? By evidence that, in point of fact, they were destroyed. What occurred subsequently may be the foundation of a new agreement, but the declaration ought to have been conformable thereto.

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ALDERSON, B.—I am of the same opinion. As to the stamp, I think the objection ought to prevail. In *Attwood v. Small* (k), where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement, as if it had been repeated therein, it is plain, from the judgment of the Court, that a new stamp would be requisite, under circumstances similar to those in the present case.

GURNEY, B.—I think the objection, as to the stamp, is a good one. As to the other point, the plaintiff could not fulfil the contract stated in the agreement, and her readiness to perform which she avers in her declaration.

Rule discharged.

(k) 7 B. & C. 390.

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ASSUMPSIT on two promissory notes for 1187*l.* 10*s.* each, made on the 30th of November, 1824, and delivered by the defendant to the plaintiffs, one payable on the 31st of December, 1825, the other on the 31st of December, 1826. There were also counts for money lent, money had and received, money due for interest, and upon an account stated. *Pleas*—As to the money counts, non-assumpsit; as to the whole declaration, the Statute of Limitations.

At the trial, before Lord Abinger, C. B., at the last sittings after Trinity Term, the facts appeared to be as follows:—The plaintiffs, who were merchants in London, had for a series of years been the agents and correspondents of the defendant and his partners, who carried on business at Madeira, the defendant himself being, in addition, the English consul in that island. Considerable advances had been made by the plaintiffs for the defendant's house, and a large arrear was due to the plaintiffs. The defendant arrived in England in the year 1824, and was arrested by the plaintiffs. A negotiation was entered into in order to effect an arrangement for the payment of the debt. By an agreement dated the 30th of November, 1824, the defendant handed to the plaintiffs, amongst other things, the two promissory notes in question; and a security for the two notes was given in these words by the defendant:—"As a security for these two notes, I hereby distinctly confirm the appropriation of the proceeds of certain

The defendant being indebted to the plaintiffs in a considerable sum of money, gave them two promissory notes in payment, which were dishonoured when they arrived at maturity. In 1827, the debt due to the plaintiffs amounted to 2245*l.*; and it was agreed, that the defendant should discharge that amount by his draft for 245*l.*, which was paid, and also by annual payments of 300*l.* out of his salary as a consul, together

with the proceeds of certain wines which he had consigned to India. The overdue promissory notes were also to stand as a security for the payment of the account. The defendant having made default in payment of one of the instalments of 300*l.* in the year 1830, held, that the plaintiffs were remitted to their original right of action, and that they might sue the defendant at any time within six years of his default in 1830, either upon the promissory notes or upon an account stated. Held, also, that a bill operates as part payment, so as to take a case out of the Statute of Limitations, from the time of its delivery, and not from the time of payment. And *quære*, whether a part payment by an agent operates as an acknowledgment, so as to take a case out of the Statute of Limitations?



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*Madeira* wines, shipped by my house at *Madeira* to Mr. *John Park*, for sale; and you will apply such proceeds towards the discharge of the said notes." When the notes became due, they were presented at the house of Mr. *Cock*, where they were made payable, but were dishonoured. Nothing, however, was done upon them until 1827, when the defendant again arrived in *England*. The debt due to the plaintiffs by the defendant then amounted to 2245*l.* 17*s.* A new agreement was entered into, the particulars of which appear in the following letter addressed by the defendant to Mr. *Cock*:—

"Dear Sir,—In consequence of the discussions that have taken place regarding the arrangement required to be made for the final liquidation and settlement of my accounts with Messrs. *Reid, Irving, and Co.*, and in order to effect this object, I have to request you will accept my draft for 245*l.* 17*s.*, at four months' date, in their favour, and further pay them, out of my salary as his majesty's agent and consul-general at *Madeira*, which, as my duly authorized attorney, you are entitled to receive at the Foreign Office, the sum of 300*l.* annually, commencing the 30th of *September*, 1828, until, by such annual payments, together with the remittances of the proceeds of the wine at *Calcutta*, (which Messrs. *R., I., and Co.*, are authorized by their agent at that place, to sell for my account,) the remaining balance of 2000*l.* shall be discharged, and for which they hold my overdue acceptances.

"*H. Veitch.*"

The draft for 245*l.* 17*s.* was accepted by Mr. *Cock*, and paid at maturity. In the month of *September*, 1830, default was made in payment of 300*l.* out of defendant's salary. With regard to the wines, it appeared that *Park* received an order from the defendant to realize the proceeds of the wines for the benefit of the plaintiffs. The wines ultimately came into the hands of *Fergusson and Co.* at *Calcutta*, who, in the year 1829, sold some portion of them, and remitted the proceeds by a bill drawn in favour of the plaintiffs at six months' sight. The bill arrived on the 3rd *March*, 1830, and was accepted by *Fergusson and Co.*'s drawees, and duly paid on the 5th of *September* following. It also appeared, that a policy of insurance had been effected by the plaintiffs many years before on a vessel of defendant's that was subsequently lost. One *Waddington*, the underwriter on this policy, became bankrupt, and dividends under his bankruptcy, of a trifling amount, were from time to time paid to the plaintiffs as agents for the defendant, and allowed by the former in account. One payment of 1*l.* 9*s.* was so paid and allowed in the year 1833. The plaintiffs, conceiving that, by the default in payment of the instalments in *September*, 1830, they were remitted to their right of action on the promissory notes, brought the present action on the 6th of *July*, 1836.

The lord chief baron was of opinion, at the trial, that there was a suspension of the plaintiffs' right of action until default made in 1830; and, therefore, that the statute did not begin to run until then. He also considered the payment of *Worthington's* dividend, and the allowance thereof in account by the plaintiffs, evidence of an open account; and, lastly, he thought, that, as the proceeds of the wines remitted by *Ferguson and Co.*, only resulted in payment in *September*, 1830, that also was an answer to the plea of the statute. He, however, reserved the point upon the Statute of Limitations. A verdict passed for the plaintiffs, subject to a motion to enter a nonsuit.

*Kelly* having obtained a rule *nisi*,

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*Maule, Cresswell, and Bayley*, shewed cause.—There were three distinct modes in which this case is taken out of the Statute of Limitations: the first is, that the agreement of 1827 acted as a suspension of the plaintiff's right of action; secondly, the payment on account of the wines had the same effect; or, thirdly, the receipt of the dividends shewed an open account.

As to the first point. The correspondence between the plaintiffs and defendant in the year 1827 was, in effect, an account stated, with a promise by the defendant to pay in a particular way. It was the result of that promise, that, until the defendant made default, the plaintiff's right of action was suspended. That the defendant adopted the new account was evident from his paying the 245*l.*, and giving security for the balance. The substance of the arrangement was, that if default were made in the payment of any instalment, that the entire sum due should be paid together. *Cock's* acceptance was a good consideration for forbearance on the part of the plaintiffs; and if they had sued upon the notes before any default in payment of the instalments, the agreement would have been an answer to the action. This shews, therefore, that the right of action on the notes was suspended, and did not revive until *September, 1830*. [*Parke, B.*—My difficulty is as to the form of the declaration. Ought it not to have specifically set out the agreement?] That was not necessary, as the effect of the agreement was the same, as far as regarded the notes, as if they had been first made in *September, 1830*. At all events, the action will well lie on the account stated. It is precisely the case of goods sold upon a credit of six or nine months, where the action need not be brought until the expiration of the credit, when the vendor may sue in an *indebitatus* count, and the Statute of Limitations does not begin to run until the credit has expired. *Helps v. Winterbottom*(a), *Mussen v. Price*(b). So, in this case, the action on the account stated never accrued till 1830. [*Parke, B.*—There is this difficulty in suing on the account stated, as it is a promise to pay, on request, monies found to be due on an account *then* stated between them. You say, that, in *September, 1830*, he might be held to be indebted for monies to be paid on request. With respect to goods sold, the cases assume that, upon the expiration of the credit, the vendee becomes indebted for the goods.] It is difficult to see the difference between the case of goods sold on credit and an account stated to be paid on credit. The same process of reasoning will apply to both. It was part of the contract to make the money due and owing as soon as the instalments failed. In *Wheatley v. Williams*(c), a letter, in which the defendant promised a balance in two years, was held to be evidence of an account stated, so as to defeat a plea of the Statute of Limitations to a count on an account stated with the plaintiffs, in action brought within six years from the expiration of the two years appointed for the payment of the balance.

Secondly, the payment of the bill in *September, 1830*, or the receipt of the dividends in 1833, takes the case out of the statute. The money on account of the wine was directed by the defendant to be paid to the plaintiffs, and reached them in *September, 1830*. The question will be, therefore, whether the payment took place when the bill was accepted by the drawers, or when it

(a) 2 B. & Ad. 431.  
(b) 4 East, 147.

(c) 1 M. & Wels. 533.

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was paid, at maturity, to the plaintiffs. [*Parke, B.*—The delivery of the bill is the act from which, in my judgment, a promise to pay may be inferred. Before Lord *Tenterden's* act, the delivery of the bill as payment would be the act evidencing the acknowledgment of a debt being due. [*Alderson, B.*—You make the agent who pays, the agent to make the acknowledgment, and hence arises the ambiguity.] If the act of the party in *India* remitting the bill is so far an act of the defendant as to operate for the purpose of taking the case out of the Statute of Limitations, it is difficult to say why the act of the agent in *London* paying the money should not have the same effect: the latter would be equally the defendant's agent as the former. [*Parke, B.*—The agent in *India* is authorized to make a payment which shall amount to an acknowledgment; not so the agent in *England*.]

However, the payment of the dividends under *Waddington's* bankruptcy, shews that there was an open account as merchants between the plaintiffs and defendant; and until the payment of the dividends ceased, the amount between the parties could not be considered to have closed.

*Kelly and Tomlinson, contra.*—The answer to the Statute of Limitations, is divided into two heads: first, by the proof of payments of *Ferguson and Co.'s* bill; and, secondly, that there was a revival of the plaintiff's right of action on the bills. As to the first of these, if the Statute of Limitations had excepted payment, in terms, from its operation, in the same manner as it has excepted infancy, &c., the question would then arise, whether a payment, by an agent, amounted to such a payment as the statute contemplated. It is no part of the law, that a part payment takes a case out of the Statute of Limitations; but the decisions have laid it down, that, where there is a clear acknowledgment of a subsisting debt, such acknowledgment will take the case out of the Statute of Limitations; and it is, therefore, as an acknowledgment merely, that a part payment operates to take a case out of the statute; as it is highly improbable that a person paying part of a debt does not thereby acknowledge that he is liable for the residue. *Tippels v. Heane* (d); *Waters v. Tompkins* (e). The words of the act are confined to a promise or acknowledgment by the party himself; there is no mention of an acknowledgment by the agent, and no authority can be found that a part payment, by an agent, is a sufficient acknowledgment. There is, however, no evidence here, that there was, in fact, a payment by an agent of the defendant, *Ferguson and Co.* never personally received any orders from the defendant; and, for aught that appears, they were strangers to him. However, if a part payment by an agent shall be considered sufficient, and it is to be assumed that *Ferguson and Co.* were the defendant's agents, yet the payment was made by a banker in *England*, and not by *Ferguson and Co.* Assuming also, for the sake of argument, that they were the defendant's agents to sell his wines and remit the proceeds, still they were not agents whose promise would bind the defendant so as to defeat the Statute of Limitations. Let us try the question by a special pleading: suppose between the time when the order was given to apply the wine to the use of the plaintiffs and the payment of the money in 1830, the defendant had died, could the plaintiffs have maintained an action on a promise by his executors? The Statute of Limitations would be an answer to any promise by

(d) 1 C. M. & R. 252.

(e) 2 C. M. & R. 723.

the defendant himself. *Green v. Crane* (f); *Sarell v. Wine* (g). There is also another defect, since the statute, viz. that the acknowledgment or promise must be in writing, signed by the party to be charged. A promise by an agent will not take the case out of the statute. *Hyde v. Johnson* (h). If the case, as insisted upon for the plaintiffs, be given in their favour, this Court will decide contrary to the statute.

Secondly, as to the payment of the dividends, the case of *Williams v. Griffith* (i) is a conclusive answer.

Thirdly, the letters of 1827 did not make any binding contract, so as to prevent the plaintiffs from suing immediately. No doubt there was a promise of forbearance; this, however, of itself, will not constitute a binding promise, unless some new valuable consideration is introduced; at all events, the plaintiffs ought to have declared, specially, upon the new contract. No new benefit, however, was conferred by the agreement of 1827. The wines had already been appropriated in 1824. Then as to the consular salary: this is dexterously assumed to be an assignment of some property to the plaintiffs by the defendant, whereby they acquired a new advantage which would constitute a good consideration for a binding promise. Now as to the salary, its payment to himself was a mere chance, contingent on the pleasure of the government; and, in point of security, it was not equivalent to the assignment of a debt. The cases of *Tanner v. Smart* (k) and *Haydon v. Williams* (l) shew, that where there is a condition annexed to a promise, that condition must be openly averred in the declaration, and that it will not be sufficient to declare in the common form. The case of goods sold on credit has been alluded to, and it has been attempted to liken this present case to that; it is, however, altogether different. When goods are sold on credit, the debt does not arise until such time as the credit has expired, and this is shewn by the old form of the count for goods sold. But the old form of the account stated is altogether different, and the alteration of its form has made no alteration in its legal effect. Throughout it had reference to a balance found to be due at the time of the accounting, and to a promise to pay at the time of the accounting. The accounting and promise are, therefore, contemporaneous. It may be that, on an accounting, there is a promise to pay at a future day; if so, it must be specially declared upon as such. Now, applying the form of that count to the party here, we find that there was an accounting in 1827; there was none in 1830. The promise, therefore, was, to pay the amount found to be due at that time, and, therefore, the statute is a bar. If there was a promise to pay, in 1830, that cannot be the promise to pay in 1827, and so there is a substantial variance. Besides, if this be considered a binding promise, it must only apply where the accounts remained in *status quo*, and not where (as in the present case,) there was a series of alterations by payments and otherwise.

LORD ABINGER, C. B.—A considerable time has been taken up in arguing this case—much longer indeed than, from the first, I considered to be at all necessary. Upon one point the case seems perfectly clear. The facts are these:—In 1824, a considerable balance is due by the defendant to the plaintiffs, who are his factors in London: in order to satisfy this balance, he gives

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(f) 2 Ld. Ray. 1101.  
(g) 3 East, 409.  
(h) 2 Bing. N. C. 776.

(i) 2 C. M. & R. 45.  
(k) 6 B. & Cr. 603.  
(l) 7 Bing. 163.

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the two promissory notes now declared upon, and these notes, when presented at maturity, are dishonoured. The defendant arrives in *London*, in 1827; a negotiation takes place between him and the plaintiffs, through *Cock*, his attorney, for the purpose of receiving his salary as consul at *Madeira*. The sum due at this time is 2245*l.* His proposition is, that the plaintiff will accept his draft on *Cock* for 245*l.*, and a payment of 300*l.*, per annum, out of his salary as consul at *Madeira*, together with the proceeds of certain *Madeira* wine, then at *Calcutta*, and apply them to the payment of their demand. The terms are accepted, and the entire form one contract. As to the wines, it is sufficient, for the present, to remark, that they were in *India*, and all parties understood that when the proceeds of the wines were realized, they would be remitted in liquidation of the plaintiffs' claim. Now a question has been made, whether this was a good consideration, so as to form a binding agreement. I have always considered that if a creditor receives in part or in full, a security of a third party, it is a good consideration for a promise to forbear suing on the original debt; in addition to which, in the present case, the monies in the hands of the defendant's agent are appropriated, as a specific fund, to satisfy the creditor. On the 28th of *September*, 1830, default was made in the payment of an instalment of 300*l.*, and the question before the Court is, whether, the action having been brought in *July*, 1836, the plaintiffs are barred by lapse of time. If the plaintiffs had no right of action but that in 1824, or in 1827, and nothing had occurred to give them a fresh right of action afterwards, no doubt they would have been barred. Could the plaintiffs have brought an action in 1827, after the new contract had been entered into? I am clearly of opinion they could not have done so, until a breach of that engagement had occurred, by reason of the non-payment of the instalment in 1830. It is conceded, by the defendant's counsel, that the breach took place within six years; but that, by the present form of declaration, the statute is made to apply, although if the plaintiffs had declared (as they might,) in another form, it would not apply. If this had been an original question in this court, for the first time, there might be ground for contending, that where there was a new consideration, the plaintiff was bound to declare upon the new promise; it is, however, now fully settled, that the party is remitted to his original form of declaring. The first cases upon the Statute of Limitations, arose in Chancery; it was the practice for the defendant to plead the whole statute, and for the plaintiff to reply the new promise. The question arose early, whether, where it appeared, on the face of the declaration, that the contract was not within the six years, the defendant might demur, and it was decided that he could not. The statute barred the remedy after six years; still there was a good consideration for a new promise, so as to make it binding, and the courts decided that it was not necessary to declare on the new promise. In *Gould v. Johnson* (m) and *Leaper v. Tatton* (n), it was decided, that a plaintiff may declare on the original promise, although he relies on a subsequent promise to take the case out of the Statute of Limitations. In the latter case, Lord *Ellenborough*, C. J., in giving judgment, says, "It is the common practice to declare upon the original contract, and, if the statute be pleaded, the only question is, whether the defence by it has been varied. It has been contended, that the rule now laid down cannot apply to a count on an account stated, but it appears to me that, upon the statement of an account, the law implies a

(m) 2 *Ld. Ray.* 838.

(n) 16 *East*, 420.

promise to pay by him against whom the balance is. In *Wittersheim v. Countess Dowager of Carlisle* (o), where a bill of exchange was drawn payable at a certain future period, for the amount of a sum of money, lent by the payee to the drawer at the time of drawing the bill; it was held, that the payee might recover the money in an action for money lent, although six years had elapsed since the time of the loan; as the Statute of Limitations only began to operate from the time when the money was to be repaid, that is, when the bill became due. So I say here the right of action only accrued to the plaintiffs from the time of the breach in 1830. Here the promissory notes are to stand as a security; what does that mean? assuredly this—that the plaintiffs shall be remitted to their rights upon the promissory notes, after breach by non-payment of the instalments. On these grounds, it appears to me that a failure having taken place in the payment of the instalments, the plaintiffs were remitted to their original rights either on the account stated, or on the promissory notes, at the time when the breach occurred.

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PARKE, B.—I am of opinion that the rule should be discharged on the third ground, viz., that there was an agreement between the parties in the year 1827, which constituted a new and binding agreement as distinguished from the original debt; and my doubt was, whether the plaintiffs could recover upon any count of the present declaration, or were bound to declare upon the new agreement. It is clear, that, unless this was a valid agreement, giving a new remedy on a new consideration, the transaction in 1827 would not have taken the case out of the Statute of Limitations; the promise ought to have been in writing, unless there was a binding agreement to pay on a new consideration, or, in default of so doing, on the original contract. Although I have great doubts whether the consular salary constituted a new fund, so as to form a binding engagement, I have no doubt whatever that *Cock's* acceptance of the bill for 245*l.* was a sufficient consideration for the plaintiff's forbearance to sue. Mr. *Cock* is a third party, who has made himself liable to the plaintiffs on the consideration that they will give time to the defendant. This is a new and binding engagement between the parties, and undoubtedly a declaration could have been framed upon it; and there would have been no breach until failure of payment in 1830. The question, then, is, whether the declaration, as at present framed, is not sufficient to take the case out of the Statute of Limitations? and, after some hesitation, I have come to the conclusion, that the count on the promissory notes can be sustained. Let us look to the terms of the agreement itself. It is a promise to pay by instalments, and, in case the instalments are not paid, to pay the original debt. The circumstances under which the original debt became payable have occurred, the debt itself has been revived, and the promise to pay it has become absolute. We may, therefore, apply to the present case the principle laid down in *Stone v. Rogers* (p), that certain events having occurred which convert the agreement, on the part of the defendant, into a simple debt, he may be made liable on a count on the promissory note.

As to the count on the account stated, I feel doubt whether there has been such an accounting as is meant by the terms of the count. I therefore prefer

(o) 1 Hen. Blac. 631.

(p) 2 M. & W. 443.

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forming my judgment on the counts on the notes, as I am satisfied on that point. Feeling that the Courts, when they changed the form of the count on the account stated, did not intend to introduce any legal difference between its effect and that of the old form, I entertain some doubt upon this head. I do not, however, entertain any doubt that the defendant is suable on the promissory notes. The cases of *Tanner v. Smart* and *Haydon v. Williams* were cited for the defendant, to shew that, if the promise was conditional, it ought to be so declared upon. I find nothing to shew, that where a condition is performed, it may not be declared upon absolutely. In *Tanner v. Smart*, Lord *Tenterden* says, "The promise proved here was, 'I'll pay as soon as I can;' and there was no evidence of ability to pay, so as to raise that which was, in its terms, a qualified promise, into one that was absolute and unqualified." So, in *Haydon v. Williams*, I find the Common Pleas expressly guard against any inference to be drawn from the form of the declaration, in case it had been shewn that the defendant was able to pay. The Court there say, "In this case there was no proof of the defendant's ability to pay at the time of the action brought, so as to satisfy the condition, and make the promise absolute and unqualified, like those in the declaration." In *Thompson v. Osborne (g)* and *Davies v. Smith (r)*, parties have been allowed to recover upon the common declaration, without stating the conditional promise. For these reasons, I am of opinion that the plaintiffs are entitled to recover upon the counts on the promissory notes. I think there was a binding agreement between the parties, and a promise by the defendant, on a new consideration, to pay the original debt in case the instalments should not be paid. This happened in *September*, 1830; and, therefore, I think the plaintiffs were remitted to their original consideration on the promissory notes.

ALDERSON, B.—I am of the same opinion. It seems to me, that there was a sufficient consideration for a new contract in 1827. This contract contained a variety of terms, which were not fulfilled in 1830; there was nothing remained for the defendant, except a simple duty to pay the money due on the promissory notes. This simple duty has been declared upon; it has arisen within six years, and is properly stated on the record. I therefore concur in the judgment of the Court.

GURNEY, B., (after stating the facts,) said—On failure by the defendants, the plaintiffs, according to the agreement, were to be remitted to their original rights. This failure occurred in 1830. They were, therefore, placed in the same situation as in 1827, when they might have sued upon the notes. It follows, therefore, that the action was in time.

Rule discharged.

## LEWIS, assignee, v. PARKES.

*Exchequer.*

**SPECIAL** demurrer. The declaration was in the ordinary form on a bail-bond, and among other things alleged that the bond "was duly assigned, according to the form of the statute." The objection was that it did not state that it was "assigned" in the presence of two credible witnesses, following the words of the statute 4 Ann. c. 16, s. 20.

In an action by the assignee of a bail-bond, it is sufficient to aver in the declaration, that the bond was duly assigned according to the form of the statute; and it need not be stated that the assignment was under the hand and seal of the sheriff, and in the presence of two credible witnesses.

*Mansel*, in support of the demurrer.—It is a well known legal principle that, in pleading, an authority given for the first time by statute must be set out with all the formalities prescribed by the statute; and an omission so to do will be bad on special demurrer. *Anonymous* (a). Before this statute the sheriff had no power to assign the bail-bond; the statute, in conferring the power, requires two formalities to be observed; the first, that it should be under the hand of the sheriff; the second, that it should be in the presence of two witnesses. This declaration is therefore insufficient, by reason of its not affirmatively stating these two matters. The case of *Miffin v. Morgan* (b), is no authority against the present demurrer; because that was a case of a judgment by *nil dicit*, which was cured by the 4 Ann. c. 16, s. 2. The present objection has never been taken on special demurrer; and must therefore be construed more strictly than if it had been on general demurrer. It is true that in *Lease v. Box* (c), citing *Robinson v. Taylor* (d), it was held to be unnecessary to make profert of an assignment of a bail-bond, or to set forth the witnesses thereto in a declaration; it must however be stated, that the assignment was made in the form prescribed by the statute.

*Humfrey, contrà*.—*Daves v. Papworth* (e), although upon general demurrer, substantially decides the question in the present case. There the declaration stated, that the sheriff "by a certain indorsement upon the bond, assigned and set over the same to the plaintiff, according to the form of the statute in such case made and provided." Two objections were taken; the first, that the plaintiff had not set forth that the assignment was under the hand and seal of the sheriff; and that, therefore, "the plaintiff had not set forth enough to support his action." To this the Court say, "As to the first, we thought this the best way of declaring, though declarations are sometimes otherwise, because the plaintiff must prove, to shew that the assignment was according to the statute, that it was under the hand and seal of the sheriff." In a note to the same case it is said, "The same point has been ruled in another part of this clause in the act. Though the statute requires the indorsement to be made by the sheriff, in the presence of two witnesses; it is not necessary to set out their names in the declaration stating the assignment, or even to state that it was indorsed in the presence of two witnesses." For this position he cites *Robinson v. Taylor*, *Lease v. Box*. He goes on to say, "It is sufficient to state generally, that the sheriff at the request and costs of the plaintiff, assigned the bond to the plaintiff according to the form of the statute." There is no distinction here aken

(a) 2 Salk. 519.  
(b) 2 Lord Ray. 1564.  
(c) 1 Wils. 121.

(d) Fort. 366.  
(e) Willes, 408.



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between a general and special demurrer; and it is evident from the whole tenor of the reasoning, that it is no more an objection on the one than on the other. In *Nightingale v. Wilcoxson*, in error (f), it was held, that in a declaration against a sheriff for an escape, it is sufficient to allege, that the writ directing the arrest was "duly indorsed for bail," without adding, "by virtue of an affidavit made and filed of record." In giving judgment, *Bailey, J.*, says, "We think this is sufficient, and that the writ which is stated to have been prosecuted out of this court, is not to be presumed to have issued improvidently. The presumption is the other way, and that all things have been done rightly, and all steps taken which are necessary by the practice of the court, or the statute law regulating that practice, to the due issuing of the writ." The omission in *Nightingale v. Wilcoxson* is, if possible, still stronger than in the present case. There are several instances in which many particulars must be proved, in order to satisfy a statute, yet which need not appear in the declaration. [*Parke, B.*—For instance, in averring the title of assignees of a bankrupt, all that is ever said is, that they are assignees according to the statutes, &c.; how complex would the statement be otherwise.]

*Lord ABINGER, C. B.*—The case of *Dawes v. Papworth*, is a sufficient authority, that it is only necessary to aver that the sheriff assigned the bond according to the statute. In order to entitle the assignee to recover upon it, he must prove that it was under the hand and seal of the sheriff, and in the presence of two credible witnesses.

*PARKE, B.*—I think the authority of *Lord Coke* will bear us out in saying that we need not state in pleading what is mere matter of evidence. The case cited from *Willes*, appears to be equally in point with the present, and for the reasons stated there by the Court.

ALDERSON, and GURNEY, Bb., concurring,

Judgment for plaintiff.

(f) 10 B. & Cr. 202.

### ARCHER v. GARRARD.

No rule to plead several matters is necessary, where all the pleas together amount only to one entire answer to the declaration.

IN this case the declaration, in debt, was delivered on the 1st of November; on the 6th the defendant pleaded as to all the demand except 40*l.*, *namquam indebitatus*; and as to 40*l.*, tender and payment into court. The defendant had not obtained a rule to plead several matters. The plaintiff having signed judgment,

*Petrsdorff* obtained a rule to set the judgment aside.

*Erle* shewed cause, and contended, that, according to the practice, and in compliance with the rule H. T. 2 Wm. 4. s. 34, the defendant was bound to have obtained a rule to plead several matters.

PARKE, B.—If all the pleas together offer but one answer to the entire matter of demand, contained in the declaration, they amount but to one plea.

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ARCHER

GARRARD.

Rule absolute.

### SMITH v. MILLER.

**BAYLEY** shewed cause against a rule for judgment as in case of a nonsuit.—This is a country cause and the issue was joined in *Easter Term*; no notice of trial was, however, given. He cited *Gough v. White (a)*.

Where there has been no notice of trial, the defendant cannot move for judgment as in case of a nonsuit, until after two terms, in a town cause, and two assizes in a country cause.

*Wightman, contrà*.—In *Jervis's Rules*, note *s*, p. 61, it is laid down, "that in a country cause, where issue is joined in an issuable term, and no notice of trial is given, the notice for judgment as in case of a nonsuit cannot be until the term after the second assizes. Here the issue is joined in a non-issuable term, and *Robinson v. Taylor (b)* shews that we are in order. The case of *Gough v. White* was a town cause.

LORD ABINGER, C. B.—Where there has been no notice of trial, the practice has been to give the plaintiff two terms in a town cause, two assizes in a country cause (*c*).

PARKE, B.—According to the former practice this application would be too soon; and the new rules make no difference as to the time for applying for judgment as in case of a nonsuit, although the entry of the issue is no longer necessary.

Rule discharged with costs.

(a) 2 M. & W. 363. (b) 5 Dowl. P. C. 518. (c) See *vide Evans v. Barnard*, post.

### DEBENHAM and another v. CHAMBERS.

**ASSUMPSIT.** The declaration stated, that the defendant was indebted to the plaintiffs, and to one *Machin*, in his lifetime, for the price and value of goods sold and delivered, by the plaintiffs and *Machin*, to the defendant, and in 50*l.* for money found to be due from the defendant to the plaintiffs and *Machin*, on an account then and there stated "between them;" and that the defendant afterwards, in consideration of the premises, then and there promised to pay the said several monies respectively to the plaintiffs and to the said *Machin*, in his lifetime, on request, yet he hath disregarded his promises, and hath not paid any of the said monies, or any part thereof, to the plaintiffs damage, &c.

*Special demurrer and joinder.*

*Platt*, in support of the demurrer.—The account ought to be averred to have

The declaration stated, that the defendant was indebted to the plaintiffs and one A. their deceased partner for money found to be due to the plaintiffs and A., on an account stated "between them."

*Breach*, that he had not paid any of the said monies or any part thereof. *Held*, upon special

demurrer, a sufficient averment that the account was stated between the plaintiffs and defendant; *held*, also, that the breach was sufficient although the promise was to pay the plaintiffs and A.

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been stated *by and between them*. The statement in the declaration will equally apply to an account stated between the plaintiffs and *Mackin*. In *Hooper v. Vestris*(a), Mr. Justice Coleridge, held an affidavit of debt insufficient, for the omission of the word *by*, as in the present case. Secondly, the breach is not co-extensive with the promise. The promise is to pay the three partners, yet if he has paid the two survivors, there will be no cause of action against him; and this is not negatived.

PARKER, B.—The account stated as well as the breach follow the form given by the rules of T. T. 1 Wm. 4. We think, therefore, there is nothing in the objection. I cannot see that there is any greater strictness required in an affidavit of debt than in the forms of declaration given by the new rules. The word “indebted” seems to have been overlooked in *Hooper v. Vestris*.

Judgment for the plaintiff.

*Platt* then applied for leave to amend but was refused.

(a) 5 Dowl. P. C. 710.

### HOLTON v. GUNTRIP.

A sheriff who has abstained from seizing goods on the premises of a defendant, in consequence of a claim being made therein, and who, consequently, at the time of applying to the Court, has not possession of the goods, is not entitled to relief under the Interpleader Act.

THIS was a sheriff's interpleader rule. A *fi. fa.* had been delivered to the sheriff to levy upon the goods of the defendant, and on proceeding to the defendant's premises, for the purpose of so doing, found that another person laid claim to the goods; upon this the sheriff retired without making a seizure.

*R. Gurney*, for the execution creditor, contended that this was not a case within the act, and cited *Braine v. Hunt*(a).

*Dowling*, for the sheriff, contended that as this was a case in which the sheriff had “intended” to seize, he was equally within the protection of the Interpleader Act as if he had actually seized.

LORD ABINGER, C. B.—The sheriff has exercised a discretion in refraining from seizing the goods; he has abandoned his intention of taking the goods, and, therefore, is not in a position which entitles him to apply to the Court under the statute.

PARKE, B., concurred.

ALDERSON, B.—This act was passed for the purpose of getting rid of the difficulties in obtaining relief in a court of equity. The sheriff must be in a condition to deliver the goods to one party or the other.

Rule discharged with costs.

(a) 1 C. & M. 418.

## RATHBONE v. FOWLER.

**H**EATON had obtained a rule *nisi* for discharging the defendant out of custody, under the 48 Geo. 3, c. 123. The original debt was for a sum under 20*l.*; the defendant gave a cognovit for the debt and costs, amounting to 55*l.*, and was now in execution upon this amount.

*Humphrey* shewed cause.—In *Robinson v. Sundell* (a) and — v. *White* (b), which were cases of warrants of attorney, it was held, that a party who had given a warrant of attorney for debt and costs, increasing the sum beyond 20*l.*, was not entitled to his discharge under this statute. There is no decision upon this point as regards a cognovit, but it is altogether analagous.

*Per Curiam*.—A warrant of attorney is to confess a judgment for debt and costs in an original suit; a cognovit is given for debt and costs in the same suit; and, therefore, they are still costs within the meaning of the statute.

*Eschequer.*

Where a defendant, who was indebted for a sum originally under 20*l.*, gave a cognovit for the debt and costs amounting to 55*l.*, and remained in execution for 12 calendar months, held, that he was entitled to his discharge under the 48 Geo. 3, c. 123.

Rule absolute.

(a) 6 B. Moore, 287.

(c) 1 Dowl. P. C. 19.

## ANGUS v. COPPARD and others.

**T**HIS was an action of trespass for taking possession of certain houses at *Horsham*. There were nine defendants residing at different parts of the county of *Sussex*. Two writs of summons had been issued out at the same time, containing each the names of all the defendants. Some of the defendants had been served with one, some with the other. The point ultimately decided in the case was, whether the issuing of two concurrent writs was an irregularity.

It is quite regular to sue out two concurrent writs of summons, provided they issue on the same *præcipe* and on the same day.

*Thesiger* and *Ogle* contended in favour of the regularity of the practice, and cited the cases of *Christie v. Walker* (a) and *Dunn v. Harding* (b), to shew, that it was no irregularity in a plaintiff to issue concurrent writs of *capias*.

Sir *W. W. Follett*, *Clarkson*, and *Tyndale*, *contrà*.

The Court took time to consider the question, and subsequently judgment was given by

**PARKE, B.**, who said—The point to which this matter was ultimately reduced is, whether it was irregular to sue out two writs of summonses at the same time, for the same cause of action. We have consulted upon the point, and are of opinion that there is no irregularity, provided the writs are issued on the same *præcipe* and on the same day. It may be attended with difficulty

(a) 1 Bing. 48.

(b) 10 Bing. 553.

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to serve several defendants who reside in different counties, and so far the suing out of two writs is convenient, while, at the same time, there is no inconvenience to the defendant, as he will only be liable to pay for one. As to the writ of capias, there must be two, as a matter of course, where the defendants reside in two counties. This being a question of irregularity, the rule will be discharged with costs.

Rule discharged with costs.

### WALLEN v. SMITH.

Where an action for a demand beyond 20*l.* was referred to arbitration, and the arbitrator awarded a sum under 20*l.* to the plaintiff, *Held*, that the plaintiff's costs ought to have been taxed according to the reduced scale set out in the directions to taxing officers, where the demand is under 20*l.* *Held*, also, that the parties may give the arbitrator the power of a judge, as regards a certificate, by an agreement to that effect in the submission.

**ASSUMPSIT**, on a special agreement, to recover 40*l.*, together with counts for work and labour, and on an account stated. *Pleas*—as to all the sum in the declaration, except as to 2*l.*, non-assumpsit, and payment of 2*l.* into court; and, secondly, a set-off. The cause was referred to arbitration, and the submission contained a direction, that judgment should be entered up according to the award of the arbitrator, in the same manner as if there had been a verdict. The arbitrator having awarded to the plaintiff the sum of 10*l.* 10*s.*, in addition to the 2*l.* paid into court, the master, on taxation, allowed the costs on the higher scale adapted to demands beyond 20*l.* A rule was obtained, by *Platt*, to shew cause why the master should not review his taxation, against which rule cause was now shewn by

*Kelly*, who contended, that the directions to taxing officers, H. T. 4 W. 4, do not apply to cases of arbitration. The words of the rule are—"In all actions of assumpsit, debt, or covenant, where the sum recovered or paid into court, and accepted by the plaintiff in satisfaction of his demand, or agreed to be paid on the settlement of the action, shall not exceed 20*l.* (without costs,) the plaintiff's costs shall be taxed on the reduced scale hereunto annexed." This rule strictly and properly applies to cases where an action is brought for a sum under 20*l.*, or where it ought to have been brought for a sum under that amount. It was introduced for the purpose of inducing parties to try before the sheriff. [*Alderson*, B.—It is clear that the directions apply merely to cases that could have been tried before the sheriff. One of the actions mentioned is covenant, which is not triable before the sheriff.] It never could have been the intention, that where a set-off reduces a demand under 20*l.*, that there the reduced scale should be resorted to. Moreover, the word "recovered" being used in the rule, shews that it cannot apply to cases of arbitration. This money has not been recovered in a legal course, which means recovery by verdict. The present case comes within the principle of the cases decided upon the construction of the 43 Geo. 3, c. 46, s. 3. There the word "recovered" is likewise used, and there are a series of cases which shew that, to bring a case within that statute, there must be a recovery by verdict. *Clarke v. Fisher* (a); *Sinthonite v. Billings* (b); *Cammack v. Gregory* (c); *Rouveyroy v. Alefson* (d); *Butler v. Brown* (e); *Rowe v. Rhodes* (j);

(a) 1 Smith, 428.  
 (b) 2 Smith, 667.  
 (c) 10 East, 525.

(d) 13 East, 90.  
 (e) 1 Br. & B. 66.  
 (f) 2 C. & M. 379.

*Brooks v. Rigby* (g). The subsequent portion of the rule, as to the judge's certificate, shews that the judges contemplated this interpretation, the arbitrators not having power to grant a certificate. In *Holder v. Raitt* (h) the cause was referred to arbitration by a judge's order, which directed that the costs of suit, reference, and award, should abide the event in like manner as upon a verdict. The arbitrator awarded that the defendant should pay a sum less than that for which he was arrested, and it was held that the Court could not give the defendant his costs under 43 Geo. 3, c. 46, s. 3.

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*Platt, contra*, was stopped.

LORD ABINGER, C. B.—This is a recovery, by the plaintiff, of a sum under 20*l.*; I think, therefore, that the costs ought to be taxed on the reduced scale, within the meaning of the direction to the taxing officers. If the rule had specified nothing but a verdict, I should have felt some difficulty arising from the cases decided upon the 43 Geo. 3; but the rule also includes cases of payment into court of a sum under 20*l.* accepted by the plaintiff in satisfaction or in settlement of the action. I think, therefore, the meaning is, that if the party does not obtain more than 20*l.* as the consequence of his action, his costs shall be taxed on the reduced scale.

PARKE, B.—I am of the same opinion. Parties may always provide, in such a case as the present, by making it a term of the submission that the arbitrator shall have the power of granting a certificate.

ALDERSON and BOLLAND, Bs., concurred.

Rule absolute for reducing the taxation.

(g) 2 Adol. & Ell. 21.

(h) 2 Adol. & Ell. 445.

### VAUGHAN v. GOADBY.

*JAMES* had obtained a rule in this case, calling on the plaintiff to shew cause why the bail-bond, which had been given by the defendant, should not be set aside, and the defendant discharged out of custody on entering a common appearance. It appeared, in moving for the rule, that the defendant had been arrested by the plaintiff, and the affidavit to hold to bail stated the cause of action to be "for money lent by the plaintiff to the defendant." The arrest took place on the 15th of *November*. The defendant, on the following day, applied to a judge for an order to enable him to arrest the plaintiff, on a suggestion that the plaintiff was about to quit the country, and the order was accordingly made. In moving to rescind the order, the plaintiff, in his affidavit, stated that he had been induced by the defendant to consider that it would be a profitable speculation to send microscopes to *South America*, and that the defendant who was a maker of optical instruments, had induced him to advance

The Court will not try the merits of an affidavit to hold to bail on motion; but will leave the party arrested to his action. Where, therefore, the plaintiff, on an affidavit made the day after the arrest disclosed a cause of action different from that which he had sworn to in his affidavit to hold to bail,

and one upon which the defendant could not be arrested, the Court refused to order the bail-bond to be given up on entering a common appearance, but left the defendant to his action for a malicious arrest.

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the money for the purpose of enabling the defendant to make such microscopes for exportation; and that the money was delivered by the plaintiff to the defendant in furtherance of a contract between them to that effect. *James* relied upon this statement in the affidavit, as shewing a subsisting contract between the parties altogether negating the state of facts on which a claim for money lent could arise on the part of the plaintiff; it being conceded that no money had passed between them on any other account.

*Erle* this day shewed cause, and principally relied on the fact that the practice of the courts did not warrant the trying of the merits of an affidavit to hold to bail in this manner; he contended, that, if the arrest were wrongful, the defendant had his remedy by action.

LORD ABINGER, C. B.—The inconvenience which would result from this course is sufficient to induce me to refuse this application on the part of the defendant. If aggrieved, his proper remedy is by action. To instance one of the cases which might arise, if such a practice were allowed; suppose a defendant who had been held to bail, and who afterward applied to a court of equity for a discovery. The proceedings at law might possibly have advanced a considerable length when the affidavit of the plaintiff in chancery might disclose some matter contradictory to the affidavit of debt; this being so, the defendant would come to the court of law to set aside all the proceedings. I think, therefore, it would be improper to establish such a precedent, and for that reason am of opinion that this rule should be discharged.

PARKE, B.—I certainly was struck with the contradiction between the affidavits. The affidavit to hold to bail disclosed a colourable cause of action, viz., money had and received to the use of the plaintiff, although he described it, in his affidavit, as money lent. The second affidavit, disclosing the subsisting contract, rebutted this colourable title. Notwithstanding this, however, I feel too strongly the force of the observations of my lord, to introduce so inconvenient a precedent, and think, therefore, that the rule should be discharged, but without costs.

BOLLAND and ALDERSON, Bs., concurring, the

Rule was accordingly discharged without costs.

### WAIT and another v. COOMBES.

*Seemle, that a writ of certiorari cannot be had by the claimant of goods, seized under a foreign attachment.*

In such a

case, the joinder of issue with the claimant, would be a joinder of issue within the 21 Jac. 1, c. 23, s. 2; and, therefore, if the writ could be had, it must be sued out within six weeks after that issue joined.

**M**ANNING obtained a rule *nisi* for an attachment against the judge of the Tolsey Court, at *Bristol*, for refusing to receive a writ of *certiorari* sued out under the following circumstances:—

The plaintiffs having attached the goods mentioned in the case of *Bruce v. Wait (a)*, under process issued out of the Tolsey Court, *Bruce*, on the 14th

(a) *Post*.

*February*, filed a claim of property, alleging the goods to be his, and praying judgment and a return. On the 11th *April*, the plaintiffs replied, that the property in the goods at the time of the attachment was in *Coombes* and not in *Bruce*, and having concluded to the country, added the similiter. The issue was entered by the plaintiffs on the 11th *May*. The usual mode of entering the issue is to state the mere fact of issue being joined, in a book kept for that purpose, and it was sworn that such entry was all that was required. *Bruce's* attorney swore that on the 20th of *June*, he was not aware of the replication being filed or of the issue being entered. On the 29th *June*, *Bruce* gave notice to the plaintiff's attorney, that he did not accept the issue, and that he intended to apply for a *certiorari*. On the 12th *July*, being the first court day afterwards held, application was made to the judge to strike out the issue, on the ground that the similiter was added without the consent of *Bruce*. This being refused, the *certiorari* was produced. The counsel for the plaintiff objected to the allowance of the *certiorari*, on the ground that six weeks had elapsed since issue joined, and 1 Tidd. Prac. 405, was cited (b). The learned judge refused to allow the *certiorari*, and the issue was called on for trial, and a verdict taken for the plaintiff without any evidence being produced on either side.

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*Kelly* shewed cause.—As to whether or no issue was joined is entirely a question of practice, and must be decided by the judge of the court. If a question were to arise as to what amounted to a sufficient joining of issue in this court, this Court would be the sole judges of that question. The learned recorder is present to certify that issue was joined according to the practice of the court. [*Parke, B.*—There is no custom to receive the certificate of the recorder of *Bristol*, which applies exclusively to the city of *London*; we must, therefore, be satisfied of the practice, in the ordinary way, by affidavit, which need not be made by the recorder, but may be made by an officer of the court.] The *certiorari* is clearly too late. The claim of property filed by *Bruce*, was an appearance within the statute, and issue was not joined until more than six weeks from that date. But a *certiorari* does not lie at the suit of the party claiming the goods. The writ can only be had in cases in which the superior court can administer the same justice to the parties as the court below (c). In the present case, if the plaint be removed, there is no process, by which this court can direct the issue to be tried anew. How can this court inquire whether the property is in the defendant or a third party, between whom and the plaintiff there is no privity? *Cross v. Smith* (d), is the only authority that a *certiorari* can be had upon a proceeding by foreign attachment, and that case confines it to the original defendant. There Lord *Holt*, speaking of inferior jurisdictions, says, "The third sort are exempt jurisdictions

(b) Stat. 21 Jac. c. 23, s. 2, enacts, that no writ of *certiorari*, &c., to be sued out, to stay or remove any action, bill, plaint, or cause, brought, commenced, or depending, in any court or courts of record, within any city, liberty, town corporate, or jurisdiction, shall be received or allowed, by the steward or stewards, judge or judges, officer or officers, of the court or courts, wherein, or to whom any such writ shall be directed, and delivered, &c., except that the said writ be

delivered to the steward, &c., before issue or demurrer joined in the said cause or causes, so depending in any such court of record, &c., having power to hold such plea, so as the said issue or demurrer be not joined within six weeks next after the arrest or appearance of the defendant or defendants in such action or suit.

(c) 1 Tidd, 398, 9th ed.

(d) 2 Ld. Raym. 837.



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*WAST*  
*L.*  
*Coombes.*

as where the king grants to a city, &c., that the inhabitants shall be sued within the city and not elsewhere: such a grant may be pleaded to the jurisdiction of the King's Bench, &c., if there is a court that can hold plea of the cause. But nobody can take advantage of it but the defendant, and if he sues out a *certiorari* it will remove the cause, because the defendant has waived his privilege for his own benefit." [Parker, B.—A *certiorari* does not remove the cause in the state in which it then is, but the parties must begin *de novo*. How are they to begin here? Alderson, B.—As soon the cause was removed, the defendant would be out of court.]

The Court then called on

Manning, to support the rule.—The last objection is met by the authorities cited in 1 Roll. Abr. 71, and 4 Vin. Abr. (f), in which it is laid down, that "where the court, which awards the *certiorari*, cannot hold plea upon the record itself, then only a tender shall be certified, because, otherwise if the record itself should be removed, there would be a failure of right afterwards." [Parker, B.—Does not that apply to the case of a *certiorari*, where the record is brought up for evidence? The rule is, that upon a removal by *certiorari* the parties must begin *de novo*; then the first step will be to declare upon the original cause of action.] The claim in this case may be considered equivalent to a point. [Parker, B.—If so, issue has been joined within the meaning of the statute.] There is here a failure of justice unless the cause be removable, because there is no complete judgment against Coombes; therefore, there can be no writ of error. *De Grenville v. The College of Physicians* (g). A *certiorari* lies to every court of record, whether it holds pleas, according to the course of common law, or under a statutory enactment. But further there has not been any issue joined within the meaning of the 21 Jac. 1, c. 23, s. 2. The appearance mentioned in that statute clearly means an appearance on summons, without arrest. It cannot be said that Coombes, the original defendant, is precluded by the issue joined between Bruce and the plaintiffs, and if so, no other party would be, or this inconsistency would follow, that the record would be removable by one party and not by another. *Fisher v. Lane* (h), and *M'Daniel v. Hughes* (i), are authorities to shew that there should have been a summons to the creditors of the garnishee before attachment issued.

PARKER, B.—If Bruce is a party to the suit, and he certainly comes in *quasi garnishee*, the *certiorari* is too late.

ALDERSON, B.—You are within the literal words and also the spirit of the act. The act provides that the party shall apply for the writ before issue joined, and there is a further provision that issue must not be joined within six weeks after appearance, or you may apply for the writ. You have had all the substantial advantages.

Rule discharged with costs.

(e) Tit. Certiorari, (C.) I.  
 (f) Ibid.  
 (g) 12 Mod. 390.

(h) 3 Wils. 297; 2 W. Black. 834.  
 (i) 3 East, 367.

## ROBERTS v. HUMBY.

Exchequer.

**K**ELLY had obtained a rule to shew cause why a writ of prohibition should not issue, directed to the commissioners of the *Bath* court of requests, on the ground that they had exceeded their jurisdiction. It appeared from the affidavits that *Humby* was a householder of *Bath*, and that his name was on the list of persons entitled to vote in the election of members of parliament for the city of *Bath*; that he had objected to the name of *Roberts* being retained on the same list of voters, but the objection was disallowed: that on the 7th of *October* last, *Roberts* had summoned *Humby* for the sum of 10*s.* for compensation for loss of time in attending the court of the revising barristers. The case was heard before the commissioners on the 18th *October*, and was adjourned until the 29th, when they adjudged *Humby* to pay 10*s.* for his debt, and 3*s.* 5*d.* for his costs.

The *Bath* court of requests has no jurisdiction to award compensation to a voter for attending the court of a revising barrister on a notice of objection.

When a want of jurisdiction appears on the face of the proceedings, the Court will grant a prohibition after sentence.

*Semble*, that though a want of jurisdiction do not appear on the face of the proceedings, a prohibition may be awarded, after sentence and execution, provided the party had no opportunity of applying earlier, and has not acquiesced in the jurisdiction of the inferior court.

The *Attorney-General* shewed cause.—First, the application is too late. The rule of law is, that, in all cases, a prohibition must be moved for before sentence, unless the want of jurisdiction appear on the face of the proceedings. The authorities on that point are collected in *Ricketts v. Bodenham* (a). By the *Bath* Court of Requests' Act, 45 Geo. 3, c. 67, that court has cognizance in all actions of debt. It is said that this is not a debt. The summons is, "to answer a demand against you by *W. P. Roberts* for the sum of 10*s.* for attendance on the 2nd day of *October* instant, on your notice, at the revising barrister's court." The sentence is distinctly for a debt. It says, "It is ordered that the defendant do pay to the plaintiff the sum of 10*s.* for his debt, 3*s.* 5*d.* for his costs." If it had appeared from the summons that this was not a debt, it might be said, that the sentence stated it to be a debt, while the other proceedings shewed that it was not. But, coupling the sentence with the summons, it clearly appears that there was a debt. In the *Matter of Poe* (b), which was an application for a prohibition to a court-martial, the Court, in giving judgment, recognised the doctrine that a prohibition cannot issue after sentence and execution in the court below. In the present case, there is nothing on the face of the sentence which shews a want of jurisdiction. It adjudges, that *Humby* shall pay a debt and costs. [*Alderson*, B.—There must necessarily be some time allowed after sentence. What is to prevent the inferior court from going on at the time the superior court is not sitting? Would you say, that, in such a case, a party is concluded by the sentence?] In *Comyn's Digest*, tit. Prohibition, the rule is laid down without any qualification.

Secondly. This court had jurisdiction. The case of *Soames v. Rawlings* (c) is distinguishable: there it was held, that the *Westminster* Court of Requests could not adjudicate upon a claim for compensation of a similar description; but the jurisdiction of the *Bath* court is more extensive. Besides, the objections now taken were not then brought before the Court. The 16th section of the 45 Geo. 3, c. 67, (the *Bath* Court of Requests' Act,) enacts, "that it shall be lawful for the commissioners to decide and determine all disputes and differences between party and party for any sum not exceeding ten pounds, in all actions or causes of debt, whether such debt shall arise from any land bill or

(a) 4 Ado. &amp; E. 433.

(b) 5 B. &amp; Adol 681.

(c) 2 C., M., &amp; R., 744.

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specialty for payment of money only, or any promissory note or inland bill of exchange, or for rent upon leases, articles, minutes, and in all causes of assumpsit and *inasmul computasset*, and in all causes or actions of trover and conversion, and in *all causes or returns founded on a quantum meruit*, and in all causes or actions of trespass or detinue for goods and chattels taken or detained." The language of this section is sufficiently comprehensive; it gives jurisdiction, first, in actions of contract, then in actions of tort, then in actions of trespass or detinue. The claim in question may be founded on a *quantum meruit*. The 17th section illustrates the meaning of the 16th in setting forth the cases which are not included in the act, such as where the title to lands shall come in question. Then the 22nd section enables a party having claim not expressly prohibited by the act, to apply to the clerk of the court for a summons expressing the sum demanded, and stating the particulars of such demand, which is to be served upon the debtor, and upon proof of such summons having been duly served, the commissioners are empowered to adjudicate upon such demand, and to pass final sentence or judgment thereon; and the 47th section makes the judgment final and conclusive between the parties to all intents and purposes whatsoever. If the court below has acted corruptly, the proper remedy is a criminal information; but if they are acting *bond fide*, this court has not power to interfere with them, unless they inquire concerning demands above ten pounds.

*Kelly*, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—The case has been very ingeniously argued, and all has been said which could be urged against the prohibition issuing; but the rule must be absolute. With respect to the first point, the case of *Ricketts v. Bodenham* does not apply. That arose upon a question in the Ecclesiastical Court, and those courts must be presumed to have a jurisdiction, unless the contrary appears on the face of their proceeding. It is different, however, with an inferior court created by act of parliament for a specific purpose; there the jurisdiction must be strictly confined to that purpose, and nothing can be presumed in favour of them, but the presumption is rather against them. In the present case there is clearly a want of jurisdiction, because the summons had no other foundation for a claim of *debt* than that the plaintiff attended before the revising barrister upon a notice given by the defendant. Now the attendance of a party pursuant to a notice does not constitute a debt. There appears to me a want of jurisdiction on the face of the proceedings. Then comes the question, whether the 45 Geo. 3, c. 67, extends the jurisdiction of the court to cases of this nature. All acts of parliament giving an inferior court jurisdiction are to be construed strictly, and the powers of the court cannot be extended by implication. It appears to me that this claim does not fall within any of the cases mentioned in the 16th section. I cannot pretend to say what is the meaning of the words in the latter part of the clause as to the *quantum meruit*, but they certainly do not mean a claim for summoning a party before a revising barrister. Then it is said, that, by the 47th section, the judgment of the inferior court is final. It is a well-known rule, that the jurisdiction of the superior courts of law cannot be taken away but by express words. Now the only writ mentioned in the 47th section is the writ of *certiorari*. It is not necessary to determine whether this Court can in all cases

grant a prohibition *after* sentence, for here a want of jurisdiction appears upon the face of the proceedings.

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PARKE, B.—I agree with my lord chief baron that the presumption of law is against the jurisdiction of an inferior court; but the ground of my decision is, that a want of jurisdiction appears upon the face of the sentence. If, indeed, it had not appeared, I should have doubted whether it was not open to the superior court to interfere, where so short a time elapses between the summons and the adjudication, and the party had not an opportunity of applying to the superior court. I concur with Lord *Mansfield*, who, in delivering judgment in *Buggin v. Bennett* (d), says, “If it appears, upon the face of the proceedings, that the court below have no jurisdiction, a prohibition may be issued at any time, either before or after sentence, because all is a nullity; it is *coram non judice*. But where it does not appear upon the face of the proceedings, if the defendant below will lie by, and suffer that court to go on under an apparent jurisdiction, (as upon a contract made at sea,) it would be unreasonable that this party, who, when defendant below, has thus lain by and concealed from the court below a collateral matter, should come hither, after sentence against him there, and suggest that collateral matter as a cause of prohibition, and obtain a prohibition upon it, after all this acquiescence in the jurisdiction of the court below. That case was decided upon the ground that the party had acquiesced in the decision of the inferior court; but if the question arose here, I should wish to take time before I established so unreasonable a rule that a party is concluded by the sentence of an inferior court, when he had no opportunity of coming to the superior court to prevent it. As to the matter in dispute here, there is no question that the court of requests had no jurisdiction.

BOLLAND, B.—I am of the same opinion.

ALDERSON, B.—It appears, on the face of the proceedings, that the inferior court has exceeded its jurisdiction; but, even if it did not so appear, there are strong reasons why this court should interfere. Prohibition being a writ at common law, may be granted at any time, even after execution; and the only exception is, that, a want of jurisdiction not appearing upon the face of the proceedings, the Court will not put the writ in force when a party has voluntarily submitted to the inferior jurisdiction. In 2nd Institute, p. 602, it is said, that “prohibition by law may be granted at any time to restrain a court to intermeddle with or execute any thing which, by law, they ought not to hold plea of; and they are much mistaken that maintain the contrary. And the king’s courts that may award prohibitions, being informed, either by the parties themselves or by any stranger, that any court, temporal or ecclesiastical, doth hold plea of that, (whereof they have not jurisdiction,) may lawfully prohibit the same, as well after judgment and execution as before.”

Rule absolute.

*Exchequer.*

## HAMILTON and others v. SHEDDON.

Assumpsit on a policy of insurance on the goods of a vessel called the *Clipper*, at and from *Liverpool* to any port or ports, place or places of landing and trade, on the coast of *Africa* or *African* islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at ports or places backwards and forwards without being deemed any deviation, with liberty for the said ship in that voyage to proceed and sail to, and stay at, any ports or places whatsoever, and with leave to load, unload, &c., goods, wheresoever she might proceed to, with any ships, boats, &c., in loading and unloading, included, particularly with liberty to tranship on board any vessel or craft in the same employ. And by a memorandum it was agreed, that the vessel might be used as a tender to any other ship or vessel in the same employ. The vessel arrived at *Benin*, and stayed there twelve months, during which time another vessel of the plaintiff's having struck on a bar at the mouth of the river, she was employed in carrying the cargo of that vessel to *Camaroones*, and, on her return home, was lost. Held, that the carrying the goods to *Camaroones* was not an act of tendering within the meaning of the policy. Held, also, that it was a proper question for the jury, whether her stay at *Benin* was unreasonable or not; and, they having found that it was, the verdict was warranted by the evidence.

ASSUMPSIT on a policy of insurance on goods, by the brig *Clipper*, at and from *Liverpool* to any port or ports, place or places of loading and trade, on the coast of *Africa* and *African* islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at all ports and places, backwards and forwards, in any order, for any purpose, without being deemed any deviation; and with liberty also for the said ship, on that voyage, to proceed and sail to and touch and stay at any port or places whatsoever, and to load, unload, and reload, sell, barter, and exchange goods and property wheresoever she might call or proceed to, with any ships, boats, factories, and canoes, in lading and unloading included, particularly with liberty of tranship on board any vessel or craft in the same employ or otherwise, and to receive from them fresh goods, and sell, barter, and exchange those goods for fresh cargo or cargoes of produce, without prejudice to that insurance. And, by a memorandum there underwritten, it was especially agreed that the said vessel might be employed or used as a tender to any other vessel or ship in the same employ. The declaration then stated the sailing of the vessel from *Liverpool*, her arrival on the coast of *Africa*, and her departure from thence on her homeward voyage, when she struck upon some rocks, whereby the goods on board were wholly lost. The defendant pleaded, thirdly, that, after the arrival of the ship at the place of loading, on the coast of *Africa*, to wit, at *Benin*, and before the said homeward-bound cargo was lost, the said ship, without any sufficient cause or excuse, did not proceed on the voyage in the policy mentioned, but deviated, departed from, and abandoned the course of the said voyage, whereby the said policy, and the risk thereby insured against, became and were wholly avoided and determined. The fourth plea alleged that the ship, after she had set sail from *Benin*, and before the loss, was employed and used on other and different occasions, and for other and different purposes, than those in the policy mentioned, and was also voluntarily kept, delayed, and detained at divers ports and places for the space of thirteen months, the same being a much longer time than was necessary or reasonable for any of the purposes in the policy mentioned, whereby the risks were greatly and unnecessarily varied and increased, and the policy became and was wholly avoided and determined.

At the trial, before *Coltman, J.*, at the last summer assizes for *Liverpool*, it appeared that the policy was effected on the 17th of *March*, 1835, and that the vessel sailed in the beginning of *May*, from *Liverpool*, on a voyage to *Africa*. On the 35th *June*, 1835, the vessel arrived at *Benin*, and discharged her cargo at a factory of the plaintiffs. Whilst lying in the *Benin* river, other vessels of the plaintiffs arrived there, and the *Clipper* remained twelve months,

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during which time she acted as tender to four of the plaintiff's vessels. Whilst thus employed, the *Laurel*, one of the vessels loaded with *African* produce, struck on a bar at the mouth of the *Benin* river, in consequence of which, her cargo was unshipped and put on board the *Clipper*, which conveyed it to *Camaroones*, in order to put it on board another vessel of the plaintiffs called the *Dædalus*. On the arrival of the *Clipper* at *Camaroones*, she took iron goods on board, and on the 10th *August* 1836, sailed for *Corisco*. Whilst returning from *Corisco*, she struck upon some rocks, when the vessel was seized upon, and broken up by the natives, and her cargo wholly carried away. The learned judge told the jury, that under the terms of the policy, the *Clipper* had no right to go from the *Benin* river to *Camaroones*, and therefore, he was of opinion, that there was a sufficient answer to the plaintiff's case. He left however, two questions to the jury; first, whether the vessel had been employed for other purposes than those mentioned in the policy; and secondly, whether she had stayed an unreasonable time in the river *Benin*. The jury gave a verdict for the defendant on both points.

*Alexander* moved for a new trial, on the ground of misdirection, and of the verdict being contrary to evidence. The policy was expressly framed with a view to the trade necessary in the *African* voyages. And there is an agreement to allow the vessel to be used as a tender to any other ship or vessel, in the same employ. The *African* trade is especially a trade of barter, and this cannot be considered as a voyage to any particular place, but a voyage of barter to any place or places, where the hopes of barter might be the greatest. [Lord *Abinger*, C. B.—The policy means that she is to be at liberty to trade with any other ship: in this case she was not acting as a trader, but for the benefit of another vessel.] All that was done, was for ships in the same employ. [*Alderson*, B.—She took the goods out of the *Laurel* as a carrier.]

LORD ABINGER, C. B.—I am of opinion that the learned judge was right in the construction of this policy, and in his definition of a ship's tender. I have always understood that the tender of a ship was one that was employed in assisting the loading of the ship, and the *Clipper* might have acted as tender to the *Laurel*, without any impropriety. But where the *Clipper* takes the cargo of the *Laurel*, and carries it to another port, she is not acting as a tender, but doing a totally distinct act; now that is not the meaning of this policy; she was to act as a tender to a particular ship, while that ship was stationed at the port, but not to carry the cargo to another port. As to the verdict of the jury, I am not prepared to say they are wrong; it was a question for them, whether the remaining out so long was within the meaning and intention of the policy.

PARKE, B.—I am entirely of the same opinion, and think the learned judge was right in the direction he gave the jury, that the act of carrying the cargo from *Benin* to *Camaroones*, was not an act of tendering within the terms of the policy. Notwithstanding the general verdict, the question resolves itself into one of construction, to be put upon the particular clause which refers to the liberty to be given on this voyage, and clearly does not authorize such an act as this: although the terms of the policy are very general, it is clear the voyage must be confined to the original voyage; there is nothing to authorize

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the vessel to act as carrier to any other ship or vessel in the same employ, and the simple question is, whether the carrying this cargo to another port, is an act of tender? If the *Laurel* had been on shore, and this vessel had been simply employed to relieve the *Laurel* from her cargo, and to carry it to a safe place, I should have thought that would have been an act of tendering within the meaning of the policy; but that is not so; the ship is used for another purpose quite unconnected with any assistance given in the shape of tender. With respect to the question upon the other issue, it is not necessary to go into that, for as the verdict on the third issue would be for the defendant, that must be for the defendant also. It has lately been decided, in the Court of Common Pleas, that there must be some limit put to voyages of this kind, and that they are not to be extended beyond a reasonable time.

ALDERSON and GURNEY, Bs., concurred.

Rule refused.

SIBONI v. KIRKMAN and another, Executors of J. KIRKMAN.

Where a replication traversed the facts contained in the plea, and concluded to the country, without an "&c." and no similiter was added, held, that the omission was amendable as a misprision of the clerk, after verdict, judgment, and writ of error brought.

*MARTIN* had obtained a rule to shew cause why the plaintiff should not be at liberty to amend the record, by adding the similiter to the replication to the third plea. The action was brought upon an agreement (a), by which the defendant's testator was to allow the plaintiff, on the purchase of a piano, the sum of 40*l.* on account of a piano before delivered by the plaintiff. The third plea was accord and satisfaction, by the delivery of another piano. The replication traversed the facts alleged in the plea, and concluded to the country, but without an "&c." No similiter was added. At the trial, before *Parke*, B., at the sittings in *Trinity* Term, the jury found a verdict for the plaintiff, and the defendant's counsel tendered a bill of exceptions to the summing up of the learned judge. Amongst other causes, it was assigned, as error, that no issue was joined upon the third plea.

*Kelly and Hoggins* shewed cause.—This application comes too late after judgment. The case is not within the Statute of Jeofails; that act applies only to what is called a mis-pleading, that is, where there is an issue joined, but insufficiently joined. In *Cooper v. Spencer* (b), the want of a similiter was held, on motion in arrest of judgment, to be a fatal objection and not amendable. In *Sayer v. Pocock* (c), the application to amend was before judgment, and besides, in that case, there was an "&c.," which the Court construed to mean every necessary thing that ought to be expressed, and therefore, after verdict the similiter might be considered as included. In *Griffith v. Crockford* (d), the court set aside the verdict, on account of the omission of the similiter. After error brought, the Court can only amend the record in respect of some misprision of the clerk. *Green v. Miller* (e). *Stockdale v. Chapman* (f) will probably be cited on the other side: there the court held, that after verdict for the plaintiff, the defendant could not take advantage of the want of a similiter, or an "&c." to a replication *de injuria*.

(a) See 1 M. & W. 423; 1 Gale.

(b) 1 Str. 641; 8 Mod. 376.

(c) Cowp. 407.

(d) 3 B. & B. 1; 6 Moore, 51.

(e) 2 B. & Adol. 781.

(f) 4 A. & E. 419.

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*Martin*, in support of the rule.—*Cooper v. Spencer* has been expressly overruled by *Harvey v. Peake* (g). From the report of *Griffith v. Crockford*, in 6 Moore, 51, it appears, that the issue was delivered to the defendant, who returned it without adding the similiter, but merely added an "&c.;" the plaintiff's attorney afterwards sent it back to the defendant, who took out a summons to amend by adding the similiter, which was refused, unless he would accede to certain terms; these the defendant objected to comply with, and carried down the issue without adding it, although it was done in making up the record. But that case was cited in *Stockdale v. Chapman*, and must be considered as overruled by it. It is laid down in all the books of practice (h), that the want of a similiter is aided after verdict, by the 32 Hen. 8, c. 30. So, also, in the note to the case of *Bennet v. Holbeck* (i). The Court has power to allow this amendment under 8 Hen. 6, c. 12, s. 2, which enacts, "that the king's judges of the courts and places in which any record, process, word, plea, warrant of attorney, writ, panel, or return, which for the time shall be, shall have power to examine such records, &c. by them and their clerks, and to reform and amend, (in affirmance of the judgments of such records and processes,) all that which to them in their discretion seemeth to be the misprision of the clerks in such record, &c." In *Sayer v. Pocock* (k), Lord Mansfield allowed the amendment on three grounds: first, that it was an omission of the clerks; secondly, he says, he will adopt the reasoning of Lord Coke, and construe, "&c." to mean any necessary matter which ought to be expressed; and, thirdly, by amending, the Court only made that right which the defendant himself understood to be so by his going down to trial. [*Parke, B.*—The difficulty is, to see how to make this a misprision of the clerk; to make the misprision appear, must not some document exist which the clerk has wrongly copied?] It may be in copying the nisi prius record. As the issue was not objected to, it must be taken to be right. In *Grundy v. Mell* (l) a similar amendment was made after verdict, on the authority of *Sayer v. Pocock*. In *Reeder v. Bloom* (m), *Gaselee, J.*, said, that, according to 2 Saund. 319, "the defect was one which might be remedied at any time." But *Wright v. Horton* (n) is the strongest authority in favour of the amendment. In that case, which was a *qui tam* action, the similiter was added, by mistake, in the defendant's name, instead of the plaintiff's, and the Court allowed an amendment; and Lord *Ellenborough, C. J.*, observes that, on referring to the case of *Sayer v. Pocock*, he found that Lord Mansfield considered a similar omission as a misprision of the clerk.

*PARKE, B.*—All that the Court wanted was an authority for saying, that this could be considered as a misprision of the clerk. The cases of *Wright v. Horton* and *Stockdale v. Chapman* are such authorities; in both, the Court considered that they had power to amend a misprision of the clerk, without thinking it necessary there should be any warrant or authority for the amendment, by the production of any document to amend by. There being those two authorities, the Court will allow the amendment upon payment of costs.

BOLLAND, ALDERSON, and GURNEY, Bs., concurred.

Rule absolute.

(g) 3 Burr. 1793.

(h) 2 Arch. Pr. 957. Tidd's Pr. 904.

(i) 2 Saund. 319 a. n. 6.

(k) Cowp. 407.

(l) 1 N. R. 28.

(m) 2 Bing. 384.

(n) 6 M. & S. 50.



*Exchequer.*

## EAGER v. CUTHILL.

On a motion for costs of the day, for not proceeding to trial, stay of proceedings cannot be had, although two days' notice of the motion be given.

GODSON had obtained a rule, nisi, for the costs of the day, for not proceeding to trial, pursuant to notice, and "why all proceedings should not be stayed until after payment of those costs." Two days' notice of this motion had been given.

Barnes shewed cause, and objected to that part of the rule which asked for a stay of proceedings.

Goslin, in support of the rule, referred to the observations of the Court in *Jones v. Howe(s)*, from which it might be inferred, that a rule, nisi, for judgment, as in case of a nonsuit, might be drawn up with a stay of proceedings, if two days' notice of the motion were given.

PARKER, B.—The master says that it is not the practice to incorporate a stay of proceedings in a rule for the costs of the day. The rule must be absolute as to the other part, and discharged as to the remainder, with costs.

Rule accordingly.

(s) *Ante*, p. 90; 5 Dow. P. C. 800.

## LAVERACK v. BEAN.

If the judge of an inferior court receive a certiorari after the time limited by the 21 Jac. 1, c. 23, s. 2, the court above will award a procedendo, although the record has been duly returned and filed.

MARTIN had obtained a rule, nisi, for a procedendo directed to the judge of the borough court of record at Hull. It appeared, from the affidavits, that an appearance was entered in the cause on the 6th July, but issue was not joined until more than six weeks afterwards. On the 15th September, a writ of certiorari issued, returnable on the 2nd November, on which day this rule was moved for. The certiorari was delivered to the judge before the jury were sworn, and he received it, and duly transmitted the record to this court, where it was filed.

Crowder shewed cause.—The 21 Jac. 1, c. 23, s. 2, no doubt prohibits the judge from receiving the certiorari in such a case as the present; but, since he has received it, the case is taken out of the operation of that statute, and falls within the 45 Eliz. c. 5, s. 2. In *Car v. Hart(s)* the habeas corpus was not delivered until after interlocutory judgment had been signed in the court below, and notice given of executing a writ of inquiry; and Lord Mansfield says, "the present case is not within the words of the act; that is plain; and it appears that the practice has gone much further than the words of the act, for that has been to allow it at any time before the jury are sworn." That case they confirmed in *Godley v. Maraden(b)*. But, the record having been filed,

(s) 2 Burr. 758.

(b) 6 Bing. 433.

cannot now be sent back. In Tidd's Practice (c), it is stated, "that if a record be filed in the King's Bench upon a *certiorari*, it can never be sent back or remanded, either in the term in which it is filed or any other; and that is plain by the act of 6 Hen. 8, c. 6, which enables this Court to remand it in case of felony, which otherwise they could not have done."

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PARKE, B.—The record, under the circumstances of the case, was irregularly on the file, and may, therefore, go down again to the court below. As to the other point, there is no doubt this case falls with the statute of James. The judge ought not to have received the writ; he is wrong in having done so, and is now to be corrected by this Court; he might otherwise have it in his power to neutralize the statute altogether.

ADDERSON and GURNEY, Bs., concurred.

Rule absolute.

(c) Vol. 1, 411, 9th ed.

### BRUCE v. WAIT and another.

**T**ROVER for oats. *Pleas*—First, not guilty; secondly, that the goods in the declaration mentioned, were not, nor was any part thereof, the property of the plaintiff; thirdly, a plea justifying the detention of the goods under a foreign attachment, issued out of the Tolzey Court, at *Bristol*, at the suit of the defendants, against one *John Coombe*, for a debt of 550*l.*, and delivered to R. P., one of the officers of the said court, to be executed; and alleging that *Coombe* had delivered the goods, in the declaration mentioned, to one *James Harris*, to be sold by him as the agent of, and for the use of *Coombe*, and that *Harris* afterwards, and before the said time when, &c., delivered the said goods, the same being the proper goods of *Coombe*, and being and remaining within the jurisdiction of the said Court, to the plaintiff, to hold them as the servant of him the said *Harris*, and until the said goods should be sold and disposed of, for the use of *Coombe*, as aforesaid; whereupon afterwards, and whilst the said writ of attachment was in full force, and whilst the said goods, so being the goods of *Coombe*, remained and continued in the possession of the plaintiff, for the purpose aforesaid, to wit, at the said time when, &c., and whilst the said goods were within the jurisdiction aforesaid, the said R. P., as such officer of the said court, under and by virtue of the said writ, and within the jurisdiction aforesaid, attached the said *Coombe* by his goods by seizing and taking the said goods, and carried them away to a place of safe custody within the jurisdiction aforesaid, and there detained them under and by virtue of the said writ, as he lawfully might, &c.; which are the said supposed trespasses, &c.

*Replication*—To the last plea, that before the issuing of the attachment therein mentioned, to wit, on the 20th *December*, 1836, it was agreed by and between the said *John Coombe* and the plaintiffs, that *Coombe* should cause the

freight, and took possession of the cargo, which was afterwards seized by the defendants of C. under a foreign attachment. *Held*, that B. had not such a property in the goods as to enable him to maintain trover against the defendants.

C., a merchant at *Waterford*, who had been in the habit of consigning cargoes of grain to B., a corn-factor at *Bristol*, wrote to latter stating that he was about to ship him a cargo of oats, and that he had drawn on him for 550*l.*, and desiring him to effect an insurance on the cargo. B. accepted the bill. Before the vessel sailed, C. stopped payment, and he then sent the bill of lading, indorsed in blank to H., not informing him of his engagement with B. On the arrival of the vessel, H. sent the bill of lading to B., desiring him to act for him. B. paid the

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said goods to be shipped at *Waterford*, in *Ireland*, for the port of *Bristol*, and would, on the arrival of the goods at the port of *Bristol*, cause the same to be delivered to the plaintiff, to be sold by him, on account of him, *Coombe*, and that the plaintiff should cause an insurance to be effected upon the goods from the port of *Waterford* to the port of *Bristol*, and should pay the freight on account of *Coombe*, and should accept a bill of exchange to be drawn upon him by *Coombe* for 550*l.*, on account of the said goods; and that the plaintiff should hold the goods when they should so have been delivered to him, and the proceeds thereof, after deducting the commission and charges thereon, as a security and fund out of which the plaintiff might be repaid all monies expended by him in effecting such insurance, and in paying such freight and acceptance. The plaintiff then averred, that *Coombe*, in pursuance of the agreement, and before the issuing of the attachment, caused the goods to be shipped at *Waterford* for *Bristol*; that the plaintiff caused the insurance to be effected, accepted a bill drawn on him by *Coombe* for 550*l.*, on account of the goods; that *Coombe* did cause the goods to be delivered to the plaintiff at *Bristol*, whereupon the plaintiff paid the freight amounting to 30*l.* 2*s.* 10*d.*, and received and took the goods into his possession, under the agreement and for the purpose therein expressed, and retained the same until the conversion complained of; and that he paid the bill of exchange for 550*l.* when due, viz., on the 23rd of *February*, 1837. *Verification.*

*Rejoinder*—That *Coombe* did not, in pursuance of the said agreement, in the replication mentioned, cause the goods or any part thereof to be shipped, nor did he cause the goods or any part thereof, to be delivered to the plaintiff, in the manner and form as in the replication alleged; on which issue was joined.

At the trial, before *Tindal*, C. J., at the last *Bristol* assizes, it appeared that *Coombe*, who was a corn merchant at *Waterford*, had been in the habit of consigning cargoes of grain to *Bruce*, who carried on business at *Bristol*, as a corn and provision merchant, for sale on commission. *Bruce* had been in the habit of accepting bills when the bill of lading came to his hands, and sometimes in anticipation. On the 12th *December*, 1836, *Coombe* wrote to *Bruce* as follows:—"I note your market continues bare of good oats, of which I will ship you a cargo per first opportunity. Should prices decline during the week I may probably draw on your house again, in anticipation, for 500*l.* or 600*l.*" On the 26th *December*, *Coombe* wrote again to *Bruce*—"Conformably with the intimation given in my last, I have again valued on your house for 550*l.* in anticipation, at two months' date." A bill of exchange for 550*l.* was accordingly enclosed in this letter, which *Bruce*, on the 27th, accepted and returned to *Coombe*. On the 5th *January*, *Coombe* again wrote to *Bruce*, as follows—"After a long and determined struggle against our ship-brokers and high freight, I have at length succeeded in making a small reduction of 2*s.* per ton; on receipt hereof, I will thank you to insure 600*l.* on oats, per *Blenheim*, A 1, of *Waterford*, D. *Doody*, master, from hence to *Bristol*. I believe the vessel will be ready to commence loading in a day or two." On the 13th *January* he wrote—"About 400 barrels of the oats are already on board, and I hope to complete the shipment to-morrow or *Monday* next." On the 23rd, *Coombe* wrote to *Bruce*, informing him that he was under the necessity of suspending his payments, and on the same day, he sent the bill of lading, indorsed by him in blank, to *J. Harris*, a corn merchant at *Bristol*, and desired *Harris*

to sell the oats for his account on their arrival, but made no mention of his previous engagement with *Bruce*, or of the embarrassment of his affairs. *Harris* sent the bill of lading to *Bruce*, requesting him to act for him in the business. On the arrival of the vessel at *Bristol*, *Bruce* paid the freight and took possession of the cargo. The defendants *Wait* and *James*, who were creditors of *Coombe*, also claimed the cargo under the foreign attachment stated in the pleadings. The learned judge was of opinion, that the plaintiff had made out no right of possession, and directed a nonsuit.

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*Erle* now moved for a new trial.—The questions are, first, whether there was not a specific appropriation of the oats by *Coombe* to the plaintiff; and, secondly, whether he had not sufficient possession through *Harris* to maintain the action. It is submitted, that as this particular cargo was consigned to *Bruce*, and he accepted a bill on account of it, the property passed to him independently of the bill of lading. In *Fisher v. Miller* (a), A. consigned a cargo for sale to B., B. being in correspondence and connected with the house of C., who had advanced money to A. on an engagement that the proceeds of the cargo should be remitted by B. to A. through C.'s hands, so as to constitute a security for the money advanced by C.; A. wrote to B. informing him that the cargo was not responsible for C.'s advances; notwithstanding which B. remitted the proceeds to C., who retained them to cover his advances: it was held, in an action for the amount by A.'s assignees against B., that the jury were warranted in considering A.'s agreement as an appropriation of the cargo, which he could not rescind. In *Haille v. Smith* (b), where A. of *Liverpool*, wishing to draw upon the banking house of B. in *London*, to a large amount, agreed, amongst other securities given, to consign goods to a mercantile house, consisting of the same partners as the banking-house, although under the firm of B. and C.; accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank, to B. and C., but the cargo was prevented leaving *Liverpool*, by an embargo; A. then became bankrupt, being considerably indebted to B., and the cargo was delivered to his assignees by the captain; it was held, that B. and C. might maintain trover for it against the captain. [Lord Abinger, C. B.—If he had transmitted the bill of lading, that case would be in point; but the question is whether, not having sent the bill of lading, he might not deliver the cargo to whomsoever he pleased.]

At all events *Bruce* was entitled to the possession by the delivery from *Harris*. *Coombe* treats *Harris* as his factor, and *Harris* puts *Bruce* in his place as such, *Bruce* at the time having an equitable right to the goods. As factor he would have a special property in the cargo as against third persons. *Nathan v. Giles* (c). [Parke, B.—If *Harris* was the factor of *Coombe*, the former had no right to bind his principal by the employment of *Bruce*. Your proposition would have been correct, if *Bruce* had been employed by the owner of the goods.

Lord ABINGER, C. B.—I am of opinion that the learned judge was correct in directing a nonsuit. There is no colour for saying that any transfer of property took place. *Coombe* committed something like a fraud in not per-

(a) 1 Bing. 150.

(b) 1 B. & P. 503.

(c) 5 Taunt. 558; 1 Marsh. 226.

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forming his promise to *Bruce*; then *Bruce* attempts to retain the goods when he had no right to take possession of them as against *Coombe*.

PARKE, B.—I am of the same opinion. It is clear there was no appropriation of any part of the cargo, so as to constitute a property in *Bruce*, prior to the time of the bill of lading having been sent; the property would therefore remain in the consignor. The object of *Coombe* was to prevent *Bruce* from keeping the goods; therefore it is evident no property passed to *Bruce*, independently of the subsequent transaction, when the goods were placed in his hands for sale. As to that part of the case, if *Coombe* had authorized *Harris* to employ a broker for the sale of the goods, and *Harris* had placed them in the hands of *Bruce* for the purpose of sale, the argument for the plaintiff might apply; but all that *Coombe* does is to authorize *Harris* to sell, and he has no right to appoint a third person.

ALDERSON, B.—I am of the same opinion.

Rule refused.

### DIXON and another v. FLETCHER.

A declaration in assumpsit stated that the defendant, carrying on business at *Liverpool*, sent to plaintiffs, carrying on business at *New Orleans*, an order to purchase cotton for the defendant, viz., if they, the plaintiffs, could purchase cotton at such price as to stand in, laid down in *Liverpool*, all charges included, *Liverpool* fair, 9½d. per lb., good fair, 10d. per lb.; then the plaintiffs were to purchase cotton to the extent of 200 bales, and if at ½d. per lb. under those prices, 300 bales, if at ¼d. per lb. under those prices, 400 bales, and to draw bills of exchange, on defendant, for the amount of the price. It then averred, that plaintiffs purchased a large quantity, to wit, 200 bales of *Liverpool* fair cotton, at such prices as to stand in 9½d. per lb., laid down at *Liverpool*, all charges included; that the cotton arrived in *Liverpool*, and there was ready to be delivered to defendant. *Breach*, that defendant did not accept the cotton so purchased. *Held*, on demurrer, that the declaration was bad, as it did not sufficiently shew that the defendants were ready and willing to deliver the 200 bales only.

ASSUMPSIT. The declaration stated that, heretofore, to wit, on, &c., the defendant, then carrying on business at *Liverpool*, in the county of *Lancaster*, sent and delivered to the plaintiffs, then carrying on business in parts beyond the seas, to wit, at *New Orleans*, in the United States of *America*, a certain order and direction to purchase cotton for the defendant; that is to say, if they, the plaintiffs, could purchase cotton in parts beyond the seas, to wit, at *New Orleans*, in the United States of *America*, at such price as to stand in, laid down in *Liverpool*, freight, duty, and every charge included, both in *Liverpool* and also in parts beyond the seas—*Liverpool*, fair, 9½d. per lb., good fair, 10d. per lb.; then the plaintiffs were to purchase cotton to the extent of two hundred bales; and if at one farthing per pound under the prices aforesaid, then the plaintiffs were to purchase three hundred bales; if at one halfpenny per pound under the prices aforesaid, then the plaintiffs were to purchase four hundred bales; and to draw bills of exchange on the defendant, for the amount of the price of the cotton so purchased as aforesaid, together with the charges of the custody and shipment thereof, and a reasonable commission to the plaintiffs on the purchase thereof; and the plaintiffs accepted and received the said order and direction, and promised to perform and fulfil all things therein contained to be by them performed and fulfilled; and, in consideration of the premises, the defendant promised to accept and receive, at *Liverpool* aforesaid, the cotton to be purchased by the plaintiffs in pursuance of the said order, and to accept any bill of exchange drawn by the plaintiffs on the defendant, for the amount or price of the said cotton, together with the charges on the custody and shipment thereof, and

400 bales, and to draw bills of exchange, on defendant, for the amount of the price. It then averred, that plaintiffs purchased a large quantity, to wit, 200 bales of *Liverpool* fair cotton, at such prices as to stand in 9½d. per lb., laid down at *Liverpool*, all charges included; that the cotton arrived in *Liverpool*, and there was ready to be delivered to defendant. *Breach*, that defendant did not accept the cotton so purchased. *Held*, on demurrer, that the declaration was bad, as it did not sufficiently shew that the defendants were ready and willing to deliver the 200 bales only.

a reasonable commission to the plaintiffs on the purchase thereof; and the plaintiffs in fact say, that, afterwards, and before the commencement of this action, to wit, on, &c., they, the plaintiffs, did purchase in parts beyond seas, to wit, at *New Orleans* aforesaid, a large quantity, to wit, two hundred and six bales of *Liverpool* fair cotton, at such a prices as to stand in  $9\frac{1}{4}d.$  per lb., laid down in *Liverpool* aforesaid, in the county aforesaid, freight, duty, and every charge included, both at *Liverpool* aforesaid, and in parts beyond the seas; and the plaintiffs, afterwards, to wit, on the day and year last aforesaid, shipped the said cotton in parts beyond the seas, to wit, at, &c., on board of a certain vessel bound for the port of *Liverpool* aforesaid, in the county aforesaid; and afterwards, to wit, on the day and year last aforesaid, they, the plaintiffs, drew a certain bill of exchange on the defendants, at sixty days sight, for a certain sum of money, to wit, for the sum of 2742*l.* 4*s.* 8*d.*, being the amount of the price of the cotton so purchased by the plaintiffs, as aforesaid, together with the charges of the custody and shipment thereof, and a reasonable commission to the plaintiffs on the said purchase thereof; and the plaintiffs, in fact, further say, that afterwards, to wit, on the 10th day of *June*, the said cotton, so purchased by the plaintiffs for the defendant, as aforesaid, arrived in *Liverpool*, aforesaid, and then was ready to be delivered to the defendant, to wit, at *Liverpool*, aforesaid, in the county of *Lancaster*; of all which said several premises, the said defendant then had notice; and the plaintiffs afterwards, to wit, on the 11th day of *June*, requested the defendant to accept and receive the said cotton, so purchased as aforesaid, and to accept the said bill of exchange, drawn by the plaintiffs on the defendant, as aforesaid, which was presented to the said defendant for acceptance: yet the said defendant, not regarding his said promise, did not nor would accept or receive the said cotton, so purchased as aforesaid, or any part of it, when so requested as aforesaid, but wholly neglected and refused so to do; and the defendant, further disregarding his said promise, did not nor would accept the said bill of exchange, when so presented to him for acceptance, as aforesaid, nor at any time afterwards, and did not nor would in any manner pay or satisfy the plaintiffs for the cotton so purchased as aforesaid, or any part thereof, and the same is wholly unpaid for: by means whereof the plaintiffs lost and were deprived of the use and benefit of the said bill of exchange, which the defendant ought to have accepted as aforesaid, and the plaintiffs are wholly unpaid and unsatisfied for their disbursements in the purchase and shipment of the said cotton.

To this declaration the defendant pleaded, thirdly, that the quantity of cotton, in the declaration mentioned to have been purchased and shipped, and for the price of which, together with the said charges and commission, the said bill was drawn, as in the declaration mentioned, was a large quantity of cotton, more than and exceeding the said extent of two hundred bales, that is to say, the same amounted to two hundred and six bales, and this the defendant is ready to verify.

Special demurrer to the third plea.

The point stated on the part of the plaintiffs was, that the plea did not contain any answer to the whole of the count which it proposed to answer.

The defendant's main point referred to the declaration as defective.

*Wightman*, in support of the demurrer.—The declaration contains a double breach: first, that the defendant would not accept or receive the cotton, or

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any part thereof; and, secondly, that he refused to accept the bill. Perhaps the breach for not accepting the bill cannot be supported, as it was drawn for too large an amount, but the other breach for not receiving the cotton is sufficient. The defendant was clearly bound to receive to the extent of two hundred bales.

*Per Curiam.*—You do not sufficiently shew, in your declaration, that the plaintiffs were ready and willing to deliver the two hundred bales only.

*Crompton* was to have argued in support of the plea.

Leave to amend on payment of costs.

### HULME and another, Assignees of JOHN SMITH, v. MUGGLESTONE.

Where a party puts his name to a bill for the accommodation of another, who afterwards becomes bankrupt, that is such a giving of credit to the bankrupt within the 6 Geo. 4, c. 16, s. 50, as may be the subject of a set-off, in an action brought by his assignees.

*Semble*, that a replication to plea of a mutual credit, which puts in issue not only the amount of the credits, but also the nature of the mutual claims, is bad for duplicity.

**INDEBITATUS ASSUMPSIT.**—The first count was for money had and received to the use of the bankrupt, *J. Smith*, before he became bankrupt; and the second count for money had and received by the defendant to the use of the plaintiffs, as assignees, since the bankruptcy. To the latter count the defendant pleaded, fourthly, as to so much of that count as related to the sum of 97*l.* 10*s.*, parcel, &c., in that count mentioned, that long before he, the defendant, had notice that any act of bankruptcy had been committed by the said *J. Smith*, and long before any fiat of bankruptcy issued against the said *J. Smith*, and before the commencement of this action, to wit, on, &c., the defendant gave credit to the said *J. Smith* to the amount of 50*l.*, by indorsing, for the accommodation of the said *John Smith*, and at his request, and without any consideration paid or given to him the defendant for so doing, a certain bill of exchange drawn by the said *Smith* upon *Melhuish* and Company for 50*l.*, and payable to the order of the said *J. Smith*, which said bill the said *J. Smith* afterwards, and before any notice to the defendant of his said bankruptcy, to wit, on, &c., negotiated and transferred for value. And the defendant further says, that afterwards, and long before the defendant had any notice that any act of bankruptcy had been committed by the said *J. Smith*, and before the date or issuing of any fiat of bankruptcy against the said *J. Smith*, and also long before the commencement of this action, to wit, on, &c., the defendant gave credit to the said *J. Smith*, in and to a certain other large amount, to wit, 50*l.*, by discounting for the said *J. Smith*, at his request, a certain other bill of exchange, drawn by the said *J. Smith* on *Melhuish* and Co.; for 50*l.*, payable to the order of the said *J. Smith*, and indorsed by the said *J. Smith*, which said bill the defendant afterwards, and before any notice to him of the bankruptcy of the said *J. Smith*, indorsed, negotiated, and transferred for value. And the defendant says, that the said credits so respectively given by him to the said *J. Smith*, as aforesaid, were credits of a nature extremely likely to end in debts from the said *J. Smith* to the defendant, and amounting, together, to a large sum, to wit, the sum of 100*l.* And the defendant further says, that afterwards, and before the commencement of this suit, to wit, on, &c., the defendant was called upon and obliged to pay and satisfy the two bills of exchange above mentioned, to certain persons being respectively the holders thereof, in consequence of the said

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bills having been dishonoured by the acceptors thereof, respectively, when they became due, of which the defendant had due notice. And thereupon, on and before the commencement of this action, the said *J. Smith* became, and at the time of the commencement of this action was, and still is, indebted to the defendant in a large sum of money, to wit, the sum of 100*l.*, being the amount of the last-mentioned bills of exchange, for money paid by the defendant for the use of the said *J. Smith*, at his request, which said last-mentioned sum of money is the same identical sum in and for the amount of which the defendant had given credit to the said *J. Smith*, as aforesaid. And the defendant further says, that before the bankruptcy of the said *J. Smith*, and also before the commencement of this action, to wit, on, &c., he the said *J. Smith* drew his bill of exchange in writing, and directed the same to the *Chesterfield* Banking Company, and thereby ordered the *Chesterfield* Banking Company to pay to himself or bearer, the sum of 97*l.* 10*s.*; and the said *J. Smith*, then and before the bankruptcy of him, the said *J. Smith*, delivered the same to the defendant by way of loan, in order that the defendant might receive the amount of the same, and thereby then gave credit to the said defendant, to and in the amount of the same; and the defendant afterwards, before the bankruptcy of the said *J. Smith*, and also before the commencement of this action, to wit, on, &c., presented the said last-mentioned bill of exchange for payment to the said drawers thereof; and the defendant afterwards, and after the bankruptcy of the said *J. Smith*, but before the commencement of this action, to wit, on, &c., received from the said drawers of the said bill of exchange, the said sum of 97*l.* 10*s.*, being the amount of the said last-mentioned bill of exchange; which said sum of 97*l.* 10*s.*, so received by the defendant, is the same sum of 97*l.* 10*s.* in the introductory part of this plea, and in the second count of the declaration of the plaintiffs mentioned: and the defendant says, that the said sums of money in the amount whereof the defendant so gave credit to the said *J. Smith* as aforesaid, and which were afterwards paid by the defendant for the use of the said *J. Smith*, at his request, amount in the whole to a large sum, to wit, the sum of 100*l.*, which said last-mentioned sum exceeds the sum of 97*l.* 10*s.* in the introductory part of this plea mentioned, and in the second count of the declaration mentioned, and the damages sustained by the plaintiffs, by reason of the non-performance of the premises by the defendant in respect thereof; and out of which said sum of 100*l.* the defendant is ready and willing, and hereby offers, to set off and allow to the said plaintiffs, the full amount of the said damages, according to the form of the statute in such case made and provided.

The defendant also pleaded, fifthly, as to so much of the second count as relates to the sum of 19*l.* 19*s.*, parcel of the monies in that count mentioned, that the said *J. Smith*, before and at the time of his bankruptcy, to wit, on, &c., was and ever since has been, and still is, indebted to the defendant in a large sum of money, to wit, the sum of 20*l.*, for goods before then sold and delivered, by the said defendant, to the said *J. Smith*, at his request, and for money found to be due from the said *J. Smith* to the defendant, on an account before then stated between them. And the defendant further saith, that afterwards, and before the bankruptcy of the said *J. Smith*, and also before the commencement of this action, to wit, on, &c., the said *J. Smith* made his bill of exchange in writing, and directed the same to the *Chesterfield* Banking Company, and thereby ordered the *Chesterfield* Banking Company to pay to the said *J. Smith*, or bearer, a much larger sum than the said sum of 20*l.* so



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due and owing from the said *J. Smith* to the defendant as aforesaid, to wit, the sum of 97*l.* 10*s.*, and delivered the same to the defendant, by way of loan, in order that the said defendant might receive the amount of the same, and thereby then gave credit to the defendant to the amount of the same; and the defendant afterwards, and at the bankruptcy of the said *J. Smith*, to wit, on, &c., received the sum of 19*l.* 19*s.* part of the amount of the last-mentioned bill, from the drawers thereof; which said sum of 19*l.* 19*s.*, so received by the defendant as last aforesaid, is the same sum of 19*l.* 19*s.* in the introductory part of this plea, and in the second count of the said declaration mentioned; and the defendant says, that the said sum of 20*l.* so due and owing from the said *J. Smith* to the defendant as aforesaid, exceeds the damages sustained by the plaintiffs as such assignees as aforesaid, by reason of the non-performance by the defendant of his the defendant's promises as to the said sum of 19*l.* 19*s.* in the introductory part of this plea mentioned; and the defendant is ready and willing, and hereby offers to set off and allow, to the said plaintiffs, the full amount of the said last-mentioned damages, out of the said sum of 20*l.* due and owing to the defendant as aforesaid, according to the form of the statute in that case made and provided.

*Replication* to the fourth and fifth pleas, that the defendant did not give credit to the said *J. Smith*, and that the said *J. Smith* did not give credit to the defendant, and that the said *J. Smith* was not nor is indebted to the defendant, *modo et forma*.

*Special demurrer* to the replications to the fourth and fifth pleas, assigning for causes, that the replication is double, and bad for duplicity, in this, to wit, that the plaintiffs have endeavoured to put in issue several distinct points, namely, the credit given by the defendant to the said *J. Smith*, and the debt due from the said *J. Smith* to the defendant, and also the credit given by the said *J. Smith* to the defendant, by traversing either of which the plea would have been answered; and for that the said replication is multifarious, and the plaintiffs have endeavoured by means of it, to put the matters in issue, which would have been put in issue by a replication of *de injuria*, which replication of *de injuria* would have been bad had they made use of it. And for that the plaintiffs, if they had a right to traverse all the several matters contained in the plea in one and the same replication, ought to have traversed them by a replication of *de injuria*, that being the form appointed by the law in such a case. And further, for that the plaintiffs have, in their said replication, traversed matter not traversable, and have taken issue upon a mere allegation, inference, and question of law, namely, on the question whether the facts stated in the said fourth plea, amount to mutual credits within the meaning of the statute in such case made and provided.

The points stated for argument, on the parts of the plaintiffs, were, that the objections taken by the demurrers are not fatal, and that the fourth and last pleas are bad, on the ground that they do not shew a mutual credit, debt, or demand within the meaning of the 50th section of the Bankrupt Act.

*J. W. Smith*, in support of the demurrer.—The replication is bad for duplicity. It puts in issue several traversable facts, any one of which would be a sufficient answer to the pleas. It is true that a traverse may be taken to several distinct facts, all tending to one point of defence,—*Selby v. Bardons* (s);

but here both the debts and the credits are in issue. The replication traverses both sides of the account, and the nature of the mutual claims. In the ordinary plea of mutual credit, it is necessary to state the credit given by the bankrupt, and the debt in consequence of that credit, and also to define the nature of the defendant's debt, and to shew that he had a right to set it off against the plaintiff's claim. Here the plaintiff not only traverses the debt claimed from the defendant by the bankrupt, but also the nature of the claim. The monies mutually claimed might have been the subject matter of two distinct actions. It would be a great hardship on the defendant if the plaintiff were allowed to put all these matters in issue, since the plaintiff, being assignee, and having the books of the bankrupt under his control, must be cognizant of the nature of the claim, and know whether it is true or false. Besides, it would compel the defendant to go into all the evidence necessary under the ordinary replication of *nil debet*. In *Faulkner v. Chevell* (b), the declaration in debt, on stat. 22 Geo. 2, c. 46, s. 14, charged the defendant that he, being deputy clerk of the peace, practised at the sessions as an attorney; the defendant pleaded that he was not, at any of the times when, &c., deputy clerk of the peace, nor did he commit any of the said supposed offences, in manner and form, &c., and the plea was held to be bad for duplicity. So in *White v. Reeves* (d), a rejoinder to a replication in trespass for stopping up a private way under an inclosure act, which alleged that the commissioners did not direct the way to be stopped up, nor gave any orders relating to the same, nor by their award set out any other way in lieu of it, was held bad for duplicity. In *Griffin v. Yates* (e) the Court held the traverse bad, though they thought that, as the plea consisted of matter of excuse, the allegations contained in it might have been put in issue by the replication *de injuria*. In *Regil v. Green* (f), a traverse of both the material and immaterial parts of a plea was held objectionable, on special demurrer, as tending to make uncertain what was the substantial issue to be tried. It must be admitted that where a plea consists of several distinct facts, so connected with circumstances of time and place as to present but one point of defence, the whole may be put in issue by the replication *de injuria*; but it is not sufficient that the point of defence is capable of being comprised in a short form of words; the principle is, that there shall only be one issue for the jury. The cases which may be quoted on the other side, are reconcilable with the principle contended for. In *Webb v. Weatherby* (g) a replication to a plea of payment, put in issue both the payment by the defendant in satisfaction, and the receipt by the plaintiff in satisfaction; but there the Court held that the receipt in satisfaction impliedly involved the payment in satisfaction, and, therefore, that the two allegations formed but one issue. In *O'Brien v. Saxon* (h), the petitioning creditor's debt, the trading, and act of bankruptcy, were in issue, but the Court held the replication good, as they all formed but one entire proposition, namely, that the plaintiff had become bankrupt. In *Robinson v. Rayley* (i), the replication traversed "that the cattle were the plaintiff's own cattle, and that they were levant and couchant upon the premises, and commonable cattle;" that, however, presented but one issuable point, namely, the alleged right of common.

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(b) 5 A. & E. 213.

(d) 2 Moore, 23; 1 Hodges, 387.

(e) 2 Bing. N. C. 579.

(f) 2 Gale, 1; 1 M. & W. 328.

(g) 1 Hodges, 39; 1 Bing. N. C. 502.

(h) 2 B. & C. 9.

(i) 1 Bur. 316.

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*Cowling, contrà.*—The pleas are bad, inasmuch as they do not disclose a mutual credit within the meaning of the Bankrupt Act. The 6 Geo. 4, c. 16, s. 50, applies to two cases: first, where mutual credit has been given; and, secondly, where there have been mutual debts, whether with or without a prior credit. Here the defendant cannot rely on the latter case, because there is no averment of want of notice of the bankruptcy; nor can he on the former, because there is no mutual credit within the meaning of the statute: the credit must be of such a nature as will necessarily end in a debt, but the credit stated with pleas might never end in a debt, as it was the duty of the party for whose accommodation the bills were provided, to take them up when they became due. [*Parke, B.*—Could not this debt be proved under the commission?] It might; but still the defendant might not be entitled to set it off. The 50th section contains a proviso respecting want of notice of an act of bankruptcy at the time of giving credit, which would be unnecessary if every thing provable could be set off. The allegation in the plea, that this credit was of a nature extremely likely to end in a debt, cannot alter the case, as that is a question of law and not for the jury. The credit cannot form the subject of a set-off, when the fact of its ending in a debt is merely contingent. *Glennie v. Edmunds* (k). In *Carter v. Breton* (l), the defendant accepted a bill of exchange for the bankrupt, after he had committed a secret act of bankruptcy, and the bill was paid away by the bankrupt, who, on the same day, agreed to sell the defendant four horses as a security for the amount, and this was held not to be a case within the fifty-second section. In *Clarke v. Fell* (m), a tradesman undertook to do work upon an article delivered to him by a person to whom he was indebted, and it was agreed that the work should be paid for in ready money; he afterwards became bankrupt, and the Court held that the fiftieth section of the Bankrupt Act did not render the assignees liable in trover, for refusing to deliver such article to the creditor on his offering to set off the price of the work against his own demand. This is a stronger case than those cited, and if a set-off be allowable here, it would have been so under the 5 Geo. 2, c. 30, the twenty-eighth section of which is similar to the present, except that, under that act, the credit must have been given prior to the act of bankruptcy. Yet it was not until the 46 Geo. 3, c. 135, that such a demand as this could even be proved. [*Parke, B.*—Are not *Ex parte Wagstaff* (n), *Smith v. Hodgson* (o), *Ex parte Boyle* (p), and *Ex parte Young* (q), precisely in point?] In *Smith v. Hodgson* it was admitted that if trover had been brought, the assignees might have recovered, and then the set-off would have been disallowed. *Ex parte Boyle* does not appear ever to have been acted upon, and *Ex parte Wagstaff* merely shews that the debt need not be due at the time of the bankruptcy.

Secondly. It is clear that where several facts make but one single point, the whole may be put in issue. In the case of a plea of set-off, the replication denies the several facts alleged in the plea. Here the credit given by the bankrupt to the defendant, the credit given by the defendant to the bankrupt, and the debt due from the bankrupt to the defendant, make but one single point, namely, mutual credit. In *Faulkner v. Chevell*, the circumstances of

(k) 4 Taunt. 775.  
 (l) 6 Bing. 617.  
 (m) 4 B. & Ado. 404.  
 (n) 13 Ves. 65.

(o) 4 T. R. 211.  
 (p) Cooke, B. L. 563.  
 (q) 3 V. & B. 40.

the defendant being deputy clerk of the peace, and that he committed the alleged offence, were distinct facts.

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*The Court* here suggested an amendment, at the same time stating that they entertained no doubt as to the sufficiency of the plea. The cases which decided that only such transactions might be set off as would necessarily end in debts, were quite reconcilable with those cases in which it had been held that accommodation acceptances might be set off.

Leave to amend the replication on payment of costs.

### TAYLOR v. MURRAY.

**M***ILLER* had obtained a rule to shew cause why the taxation of costs in this cause, final judgment, and execution, should not be set aside for irregularity. The plaintiff had obtained judgment on demurrer, and had given due notice of taxation of costs, but had neglected to deliver a bill of costs as required by the rule of this court of M. T. 1 Will. 4, s. 10.

A judgment on demurrer is not within the rule of *Exchequer*, M. T. 1 W. 4, s. 10, which requires the delivery of a copy of the bill of costs before taxation.

*Humfrey* shewed cause.—A judgment on a demurrer is not within the terms of this rule, which requires “that one day’s previous notice of the time of taxing costs upon *rules, orders, town postea, and inquisitions*, and a copy of the bill of costs and affidavit to increase, (if any,) shall be given and delivered by the attorney or the attornies of the party or parties whose costs are to be taxed, to the attorney of the other party or parties in the same action, at the time of service of such notice; and that in the cases of *postea* and *inquisitions* in country causes, the notice shall be given two days, and a copy and affidavit delivered two days before such taxation.” The present taxation is neither on a rule, order, *postea*, or *inquisition*. The case of *Wilson v. Parker (a)*, in which it was held, that the delivery of a copy of a bill of costs was imperative, unless waived by the opposite party, does not apply, as there the judgment was on a *postea*.

An omission to comply with the above rule is no ground for setting aside the judgment and execution, but only for reviewing the taxation.

*Miller, contrà*.—The form of the rule for judgment is, “Upon hearing counsel for the plaintiff, and no cause being shewn to the contrary, it is *ordered* that judgment be entered for the plaintiff in the action.” This case, if not within the precise words, falls within the meaning and spirit of the rule.

LORD ABINGER, C. B.—This is clearly not an order within the meaning of the rule; and if it were, it is no ground for setting aside the judgment. You may go again before the master, and see if the costs are excessive.

PARKE, B.—The omission to comply with the rule is no reason for setting aside the judgment and execution, but the costs may be re-taxed afterwards.

Rule discharged, with liberty to go again before the master.

(a) *Ante*, p. 46; 5 Dow. P. C. 461.

*Eschequer.*

NICKISSON and another, Assignees of THOMPSON, a Bankrupt,  
v. TROTTER.

Trotter, by the assignees of a bankrupt, for certain watches.

*Plea*—that defendant was a pawnbroker, and that they were pledged with him.

*Replication*—that it was corruptly agreed that defendant should lend the bankrupt a sum exceeding 10*l.*, and should forbear and give day of payment thereof, to the bankrupt, until the expiration of one year next after such loan, and that the bankrupt should pay more than lawful interest, and for securing repayment the bankrupt should pledge the watches. At the trial it did not appear that there was any agreement as to the time the watches should remain in pledge. The judge amended the record by inserting the words "redeemable in the mean time." *Held*, on motion to enter a nonsuit, that this was a contract within the Pawnbrokers' Act.

TROTTER for certain gold and silver watches. The first count stated the property to be in the bankrupt; the second in the assignees.

The defendant pleaded, fourthly, that defendant was a pawnbroker, and that *Thompson*, before he became a bankrupt, to wit, on, &c., deposited the said watches with the defendant, to be kept as pledges and security, as well for the repayment of 93*l.* 11*s.* 7*d.* then lent and advanced to *Thompson*, on the deposit and security of the said watches, as for the payment to the defendant of certain interest, by the said *Thompson*, then agreed to be paid to him, upon and for the loan and forbearance of the said monies so lent and advanced; and that when *Thompson* became bankrupt, and from thence hitherto, the said principal sum and interest were due and owing to the defendant. The fifth plea, which was to the second count, was similar to the fourth, and related to the remainder of the watches. *Replication* to the fourth plea, as to five gold and seventeen of the twenty-nine silver watches therein mentioned, that before they were so pledged and deposited with the defendant, to be kept, &c., to wit, on the 2nd day of *May*, 1835, being one of the days and times in the said fourth plea mentioned, it was corruptly and against the form of the statute agreed by and between *Thompson* and the defendant, that the defendant should lend and advance to *Thompson*, a certain sum exceeding 10*l.*, to wit, 77*l.* 11*s.* 7*d.*, and that the defendant should forbear, and give day of payment thereof to *Thompson*, for a certain time, to wit, until the expiration of one year next after the making such loan and advancement; and that the said *Thompson*, for the loan and advance of the said sum, and for giving day of payment thereof, for each and every calendar month the same should be forborne payment by the defendant, should pay to the defendant more than lawful interest at and after the rate of 5*l.* per cent., per annum, on each and every twenty shillings of the said sum so lent and advanced as aforesaid, that is to say, the sum of three pence; and that, for securing the repayment of the said sum, with interest as aforesaid, *Thompson* should pledge the said watches with the defendant. It then stated, that, in pursuance of the agreement, the watches were deposited and the money advanced, and that the interest agreed to be paid by the defendant exceeded the rate allowed by the act of parliament, whereby the agreement was wholly void.

At the trial, before *Parke*, B., at the summer assizes for the county of *Northumberland*, it appeared that the defendant was a pawnbroker at *Newcastle*, and that the watches had been pledged with him by the defendant, but no agreement was made as to the time they should remain; *Thompson* had said, he should only require them to continue in pledge for a month or two. It was objected, on the part of the defendant, that this evidence did not support the replication, which alleged that the defendant should forbear and give day of payment to *Thompson*, until the expiration of one year next after the making of such loan and advancement. The learned judge, on the application of the plaintiff's counsel, amended the record, in pursuance of 3 & 4 W. 4.

c. 42, s. 24, by inserting the words "redeemable in the mean time." The jury having found a verdict for the plaintiff,

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*Alexander* moved, pursuant to leave, to enter a nonsuit.—The evidence did not support the contract alleged in the replication. It was not a contract to forbear for a year, and, therefore, not within the Pawnbroker's Act, 39 & 40 Geo. 3, c. 99, s. 17. The amendment did not alter the case; for, unless the defendant was restricted from demanding payment until the expiration of the year, the variance still remained. [Lord *Abinger*, C. B.—Would not the pawnbrokers be liable to penalties in this case?] That would depend upon whether or no it was within the Pawnbrokers' Act. It ought to have been tried as an ordinary case of usury, in which an amendment would not have been allowed.

LORD ABINGER, C. B.—The question for the jury was, whether the parties did not intend to apply all the terms of a pawnbroking contract, with the exception of the amount being beyond 10*l.*?

PARKE, B.—It is clear that the contract, so far as the extent of time, was meant to be on the usual terms of a pawnbroker.

Rule refused.

### SMART v. JOHNSTONE.

*R. V. RICHARDS* had obtained a rule *nisi* for setting aside the bail-bond given by the defendant on entering a common appearance. The application was made on two grounds: first, that the defendant was a peer of *Scotland*, by the title of Earl of *Annandale* and Viscount *Johnstone*, and had voted as such in the election of representative peers for *Scotland*; and, secondly, that the copy of the writ, served on the defendant, contained no date.

The omission of the date in a copy of a writ of capias, is an irregularity for which the Court will discharge a defendant on entering a common appearance.

*Platt* shewed cause, on an affidavit, that inquiries had been made at the Herald's Office, and that the officers there stated that the defendant was not a peer of *Scotland*, and that there were no less than fifteen claimants for the Earldom of *Annandale*, which claims were still pending in the House of Lords. [*Alderson*, B.—As there is an affidavit that he voted at the election of *Scotch* peers, it is within the case of *Digby v. the Earl of Stirling* (a).] Where the question of privilege is doubtful, the Court will not discharge the defendant on motion, but will leave him to his writ of privilege. *Luntley v. Battine* (b). [Lord *Abinger*, C. B.—The case of Lord *Stirling* was decided when the House of Lords was not sitting: but, as it is sitting now, the application should be made there.] Then as to the omission of the date in the copy of the writ, that does not necessarily invalidate the arrest, though, perhaps, it might be a good objection to serviceable process.

*Richards*, in support of the rule, contended that the present case was

(a) 1 Dowl. P. C. 248.

(b) 2 B. & Ald. 234.

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stronger than that of *Digby v. the Earl of Stirling*, since there it appeared the defendant's vote had been protested against.

PARKE, B.—If the copy of the writ served on the defendant is irregular, the arrest is bad. The rule must be absolute on that ground.

ALDERSON, B.—Then we need not decide the other point.

Rule absolute with costs.

No action to be brought.

REGINA v. Sheriff of MIDDLESEX, in the case of DIGNAM v.  
REITTER.

A body-rule expired on the 20th October, on which day bail came up to justify at chambers, but were rejected on account of a defect in the notice of justification. The judge made an order for three days' further time to justify, "without prejudice to the sheriff's being in contempt." An attachment having been subsequently obtained against the sheriff, the Court set it aside for irregularity.

*HUMFREY* had obtained a rule to set aside an attachment against the sheriff of *Middlesex* for an irregularity. The sheriff had been ruled by a judge's order to bring in the body, which rule expired on the 20th July at eleven o'clock. On the 17th, a notice of justification of bail was given for the 20th, but was not served until after eleven o'clock. The bail attended on the 20th, when an objection was taken that the notice of justification was too late. The learned judge made an order, "that the bail have three days further time to justify in the action, without prejudice to the question as to the sheriff being in contempt." On the 23rd, the bail justified accordingly.

*Petersdorff* shewed cause.—The rule of H. T. 4 W. 4, requires, that in case a bailable writ shall expire in vacation, and the sheriff return *cepi corpus* thereon, a judge may, by order, require the sheriff to bring in the body, by putting in and perfecting the bail to the action in the like number of days as the practice requires with respect to bringing in the body in term. Here the sheriff was bound to justify bail on the 20th; as soon, therefore, as the bail were unable to justify, the sheriff was in contempt; and the judge's order, having been made without prejudice to the sheriff's liability, cannot affect the case. The contempt was not purged by the subsequent justification, but the sheriff still remained liable to an attachment. *Rex v. Sheriff of Middlesex* (a).

*Humfrey*, in support of the rule.—The sheriff had the whole of the 20th to justify bail; and, therefore, he was not in contempt at the time the order was made. [*Parke*, B.—Here the time was given without prejudice, and the sheriff would be in contempt, because he could not justify upon the 20th, not having given notice.] The bail had three days' further time to justify, without prejudice to the question of the sheriff being in contempt *at the time*. [*Parke*, B.—If the order is to be construed without prejudice to the question of the sheriff being *now* in contempt, your argument is right.] If it were not so, the order would have been an injury to the defendant, as he might otherwise have brought in the body before the evening of the 20th.

PARKE, B.—The Court are of opinion that the true meaning of the order is, that time shall be given without prejudice to the sheriff's being in contempt at the time of making the order. If this construction be right, it was unnecessary to insert any clause in the order, but it may have been introduced *pro majori cautela*. If the word *now* had been inserted, it would have removed all the difficulty. I own I thought differently at first; but as the rest of the Court are of that opinion, I do not mean to dissent.

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ALDERSON, B.—Probably the argument before the learned judge was, that the sheriff was in contempt by the rejection of the bail. The judge there says, "I will give you further time, without prejudice to that question." That question has now been argued, and the Court think the sheriff was not then in contempt.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

### DRURY v. DAVENPORT.

THOMAS had obtained a rule *nisi* for setting aside the copy of a writ of summons, on the ground that it commenced "*William the Fourth*," &c., instead of "*Victoria*," &c.

Where a copy of a writ of summons commenced "*William the 4th*," instead of "*Victoria*," the Court set it aside for irregularity.

*Wightman* shewed cause.—The copy of the writ is tested in the name of the chief baron; and as it is perfectly correct in all other respects, the error in the name could not mislead the defendant. In *Elvis v. Drummond* (a), which was decided in the eighth of Geo. 4, the plaintiff, in an action against the sheriff for an escape, alleged in the declaration that he sued out a writ of *the king*, called a *ca. sa*. The writ given in evidence was in the name of *George the Third*; but the Court were clear that, the writ being tested in the name of the present chief justice, and being indorsed with the proper date, there was no material variance. [Parke, B.—That case was decided before the new statute, which gives a precise form.] The form given by the statute is in the name of *William the Fourth*. The statute, however, does not alter the law or practice.

PARKE, B.—Since the statute we have always held it necessary to be strict. The rule must be absolute, with costs.

Rule absolute.

(a) 4 Bing. 278; 1 M. & P. 88.



*Eschequer.*

BOOTH v. Lady HYDE PARKER.

Where a cognovit is given, with liberty, in case of default in payment of the debt and costs, to enter up judgment for debt and costs; it is irregular to sign judgment before the costs are taxed, unless the plaintiff means to waive his right to costs; in which case he should give the defendant notice of such intention.

ON the 28th *October*, the defendant gave a cognovit, by which she confessed the action, and that "the plaintiff had sustained damages to the amount of 57*l.*; but no judgment was to be entered up, unless default should be made in payment of the debt and interest, together with costs, on the 9th *November*; and in case defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the said debt and costs, together with the costs of such judgment and execution; and the defendant consented that the costs should be taxed as between attorney and client, and agreed to pay and include in such costs the expense attending the filing of the cognovit. On the 10th *November*, the defendant not having paid any part of the debt or costs, the plaintiff signed judgment, without having taxed the costs or made any demand of the debt.

*Barstow* obtained a rule to set aside the judgment for irregularity, on the ground that, as the cognovit stipulated for payment of debt and costs on the 9th *November*, the plaintiff could not sign judgment without having previously taxed the costs.

*Kelly* shewed cause.—All that has been done is the mere act of making an entry upon the judgment paper that judgment was signed on a certain day. The practice has been, first to sign judgment, and then to tax the costs upon that judgment. If this case be held an irregularity, a party could not, after the day of payment has passed, sign judgment and issue execution for the debt alone. [*Parke*, B.—If he means to waive the costs, he has only to say so. Here the question is, whether the defendant is not justified in waiting until she knows the amount of costs. *Alderson*, B.—Has not the defendant contracted to pay the debt and costs together, and has not the plaintiff contracted that he will not require payment of the debt without costs?] Then this inconvenience would follow, that two taxations would be necessary, one to ascertain the amount of debt and costs, and another to ascertain the costs of the judgment and execution. It might be doubtful whether there could be two taxations upon such a judgment. [*Alderson*, B.—How can a party be said to have made default, when you do not give him the means of performing his duty?] If the defendant were insolvent, it would be useless to go to the expense of a taxation. [*Parke*, B.—In that case you should give him notice; this instrument contemplates but one proceeding.] The practice has always been to commence entering the judgment, and when the costs are taxed, judgment is signed for the whole amount. [*Parke*, B.—The master cannot certify any certain practice in that respect; he says it is common for parties to come with the cognovit to tax the costs upon.] Then there must be another taxation to get the costs of the judgment. [*Parke*, B.—Yes; one taxation in order to let the defendant know what he is to pay, and another upon the final judgment.] In this case final judgment has not been signed; so that the extent of the objection would be, that the plaintiff is not entitled to

the costs of beginning to sign judgment, because he has not afforded the defendant an opportunity of paying the debt.

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*Barstow*, in support of the rule.—Where a cognovit is given with a stay of judgment until default in payment of *debt and costs*, the plaintiff should tax the costs before he signs judgment. From inquiry of the officers of the Queen's Bench, that appears to be the common practice in that court. In *Wilson v. Northern*(a), the defendant had given a cognovit payable on a certain day, and, if not paid, the costs were to be taxed and judgment signed; and Lord *Abinger*, C. B., says, "As the agreement was to tax the costs and sign judgment, the judgment ought not to have been signed before the costs were taxed."

*Parke*, B.—The rule must be absolute to set aside the judgment. With respect to the observation that the mere entry on the judgment paper is not a signing of judgment, it is true that judgment is not completely signed; but by the terms of this cognovit, it is irregular to commence signing it. The question, then, resolves itself into the terms of the cognovit; does it mean that there is to be a tender of the debt, and another tender of the costs? or rather is not this the meaning of it, that there is to be but one tender by the defendant, viz., of the amount of the debt and taxed costs? In order to enable the defendant to make that one tender, and to obviate the inconvenience of two separate tenders, it is necessary for the plaintiff to go through the form of ascertaining the amount of costs, as that is a fact which lies within his own knowledge. If the plaintiff intended to abandon his claim to costs, he should have given notice to the defendant, and then, upon non-payment of the original debt, the cognovit would have been forfeited. By the terms of this cognovit, there should be but one tender. If it be intended to make the non-payment of the debt only a forfeiture of the cognovit, the parties should so stipulate.

*Alderson*, B.—I agree with the Court in their reasoning in the case of *Wilson v. Northern*. It is true, that, in that case, there were circumstances which might have induced a decision the other way; but it cannot, therefore, be considered as no authority, when the reasons given by the judges are precisely in point on the present occasion. But, independently of that, the plain sense is, that judgment ought not to be signed until default in payment of the aggregate sum. If that sum has never been ascertained, how can the party make a default in not having paid it? If the plaintiff means to waive the costs, he should tell the defendant so.

*Gurney*, B., concurred.

Rule absolute, with costs.

(a) 4 Dowl. P. C. 212.

*Exchequer.*

## AIKMAN v. CONWAY.

It is not irregular to enter a rule to plead before service of notice of declaration, provided the notice of declaration be served on the same day.

ON the 26th *October*, before three o'clock in the afternoon, the plaintiff entered his rule to plead, and at six o'clock in the evening of the same day, served the defendant with a notice of declaration. On the 31st of *October*, the plaintiff signed judgment for want of a plea, and on the 1st *November* levied under a writ of execution. On the 4th *November*, a summons to set aside the judgment and execution, was taken out before *Bolland*, B., at chambers, returnable on the 6th, the 5th being *Sunday*. The learned judge referred it to Master *Walker*, who certified that the rule to plead could not be entered until after declaration filed and notice given. No order having been made by the learned judge,

*Chandless* now made a similar motion, and relied on *Bennett v. Smith* (a), in which it was held, that a notice of declaration must be served previously to filing a rule to plead.

*R. V. Richards* shewed cause, and objected, that the application was too late. The case fell within the rule laid down in *Hinton v. Stevens* (b), where it was held, that an objection to a notice of declaration, on the ground of variance from the writ, must be taken within four days from the time of serving the notice, and that an intermediate *Sunday* counts as one of those days. [*Parke*, B.—There the objection was in the nature of a plea in abatement for a misnomer. We think this application in time.] Then as to the other point; there is no proof the rule to plead was entered before the notice of declaration was served. It is true a *præcipe* was given before the office closed at three o'clock; but the rule may not have been actually entered until long afterwards. [*Parke*, B.—The officer says the instruction to enter the rule is tantamount to entering it. In *Tidd's Practice* (c) it is said, that a rule to plead may be entered on a *præcipe* with the clerk of the rules, in the King's Bench, or secondaries in the Common Pleas, at any time after the delivery or filing notice of the declaration.] It appears, from inquiry at the Masters' Office in the King's Bench, that the practice has always been to enter the rule to plead on the same day that the notice of declaration is served. If it were not so, the consequence would be, that the defendant would have an extension of the time within which he is to plead. *Bennett v. Smith* does not apply to the present case. There it appeared, that the defendant lived at *Liverpool*, and consequently could not receive the notice of declaration until the day after the rule to plead was entered.

Lord ABINGER, C. B., stated that they had sent to inquire the practice of the Court of King's Bench, and the officers reported that they considered the judgment in the present case regular. It was the constant practice there to enter the rule to plead on the same day the notice of declaration was given.

PARKE, B.—If the two acts be done on the same day, the Court will not in-

(a) 2 Hodges; 5 Dowl. P. C. 353.

(b) 1 Har. & Wol. 521.

(c) Vol. 1, p. 474, ed. 9.

quire at what time of the day they are done. This case is distinguishable from *Bennett v. Smith*, for there the rule to plead must have been entered the day before the defendant received any notice of declaration.

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 AIXMAN  
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ALDERSON, B.—It is better to adhere to the practice. If two or three things are to be done on the same day, the Court will presume that to have been done first which ought to have been so done.

Rule discharged without costs.

### WRIGHT v. LAINSON.

IN this case (reported *ante*, p. 202.) *Butt* moved for leave to add a plea traversing the averment in the declaration—that the defendants seized the goods of *Hayes*, (the bankrupt,) and also a plea disclosing the circumstances and the dates of the act of bankruptcy and of the issuing the fiat. The act of bankruptcy was before the seizure, but the fiat did not issue until after it; it was therefore doubtful whether the proposed defence was available under the first plea, since it might be said that the goods were *Hayes's* at the time of the seizure.

In an action against the sheriff for a false return of *nulla bona*, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead two pleas, one traversing the seizure of the goods, and the other setting out the dates, &c., of the act of bankruptcy and fiat.

LORD ABINGER, C. B.—At the time of the seizure, the goods belonged to the assignees, by relation to the time when the act of bankruptcy was committed. To prove the shorter plea, you must prove the trading, the petitioning creditor's debt, and an act of bankruptcy before the date of the levy.

ALDERSON, B.—If these two pleas were allowed, it would be introducing all the evil of double pleading, which the new rules were intended to prevent. You may take which of them you please.

Motion refused.

### ROBINS v. BRIDGE.

THIS was an action to recover the expenses incurred by the plaintiff in attending at the *Taunton* assizes, to give evidence, pursuant to a subpoena served on him by the defendant, in a cause of *House v. Leakey*, in which the present defendant was attorney for the then defendant. At the trial, before the under-sheriff of *Somersetshire*, it appeared that the subpoena stated the name of the cause, but did not state for which party the plaintiff was required to give evidence. No money was tendered to the plaintiff, nor was there any agreement to pay his expenses. The under-sheriff was of opinion that the defendant was not liable in law, but left the question to the jury, reserving liberty for the defendant to move to enter a nonsuit. A verdict having been found for the plaintiff, for 10*l.*,

An attorney who subpoenas a witness is not liable for the expenses occasioned by his attendance.

*Bompas*, Serjt., in *Michaelmas* Term, 1836, obtained a rule accordingly, against which,

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*Erie and Bere* now shewed cause.—There are several authorities to shew that an attorney may be personally liable to the party he employs, though only acting on behalf of his client. *Ex parte Hartopp* (a); *Scrace v. Whittington* (b). In *Burrell v. Jones* (c), the solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave a written undertaking that they, “as solicitors” to the assignees, undertook to pay the landlord his rent, provided it did not exceed the value of the effects distrained, and it was held that they were personally liable. The solicitor under a commission of bankruptcy, who agrees to work the commission for a certain sum, is liable to the messenger for his fees. *Hartopp v. Jukes* (d); *Hart v. White* (e). A person who attends as a witness under a subpoena, but refuses to give evidence unless his expenses are paid, may nevertheless maintain an action for his expenses against the party who subpoenaed him. *Hallett v. Mears* (f). In many instances an attorney, by the known course of business, makes himself personally liable, as to the stationer for paper, copying briefs, &c. A bailiff may maintain an action for his fees against the attorney who employs him. *Foster v. Blakelock* (g). An attorney may always provide means to protect himself, by obtaining money from his client. *Vassandau v. Browne* (h). But where, as in this case, the attorney delivers his subpoena without expressing for which party it comes, he is in effect an agent who enters into a contract without naming his principal, and is personally liable. *Thompson v. Davenport* (i).

Sir *W. Follett* and *Bompas* in support of the rule.—The argument that this is the case of an undisclosed principal, cannot apply, since it is evident the plaintiff must have known for which party he was subpoenaed. The question then is, whether an attorney who conducts a cause, undertakes to advance the necessary expenses, and to look to his client for repayment. It is submitted that he does not. The term “attorney” means one who represents another. In the early periods of the law, attornies were unconnected with the courts, and were merely agents appointed to act for another. The 4 Hen. 4, placed them under the control of the courts, but in no way extended their responsibilities. By the 33 Hen. 6, c. 6, a power was given to the judges to limit their number. The whole proceedings are conducted in the name of the party, and the attorney appears as a mere agent. No doubt an attorney may make himself personally liable, as in the cases cited; but there the question has always been, whether he did not intend to be responsible, though he contracted as attorney. It is well known that an attorney has profit for drawing the briefs, and of course he cannot charge for them and stationery too. The preparation of the briefs include the paper, witing, &c., he therefore undertakes to provide those materials as subsidiary to his own profit. So with respect to an agent in town; he gives credit to the attorney in the country who employs him, and not to the client. It was on this principle that *Scrace v. Whittington* was decided. In *Hallett v. Mears* there was some evidence of a promise to pay at the time of serving the subpoena. In *Hartop v. Jukes* and *Hart v. White*, the

(a) 2 Ves. 349.  
 (b) 2 B. & C. 11.  
 (c) 3 B. & A. 47.  
 (d) 2 M. & S. 438.  
 (e) Holt, 37 b.

(f) 13 East, 15.  
 (g) 5 B. & C. 328.  
 (h) 9 Bing. 402; 2 M. & S. 543.  
 (i) 9 B. & C. 78.

defendant, by his contract, made himself personally liable. [*Parke, B.—Harris v. Osbourn* (k) decided, that where a client employs an attorney to conduct a suit, it is an entire contract to conduct a suit to its termination, and determinable by the attorney only on reasonable notice.]

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*Cur. adv. vult.*

LORD ABINGER, C. B., now delivered the judgment of the Court.—The question in this case was, whether an attorney who caused a witness to be subpoenaed without an express promise to pay his expenses, is liable to an action, at the suit of the witness, for such expenses? The importance of the case has induced the Court to take time to consider their judgment. The case of *Smith v. Smith*, in which my brother *Parke*, before whom it was tried, nonsuited the plaintiff, was not brought before the Court in banc. In *Hallet Mears* which was an action by a witness against the party who subpoenaed him, there was evidence of a promise by the defendant, when the subpoena was served, to pay the expenses. *Scrace v. Whittington* and *Foster v. Blakelock*, were actions by one attorney against another, and in each of those cases there was evidence of a course of dealing from which a contract could be inferred. This is the first case in which the question has arisen, whether there is an implied contract by an attorney to pay the expenses of a witness, when no money is tendered; and there is in this case a further question, whether the law would imply a contract, on the part of the client to reimburse an attorney.

It is sufficient for the decision in this case, to say, that there is no implied contract, by the attorney, to pay the witness. An attorney is clearly an agent, the name of whose principal is disclosed upon the subpoena; and, according to the known maxim of law, an agent, the name of whose principal is disclosed, is not liable upon any contract made by him as such agent, unless he thinks fit to bind himself. An attorney does not make his client liable upon contracts with which he may be charged. If he employ a stationer, instead of his own clerk, to copy briefs, that is merely employing an agent to do the business, for which he makes a charge. So also as to the paper which he may purchase. He may also be personally liable for the ordinary fees payable to the officer of the court; for it is implied, when an action is brought, that he will pay the fees, and the client cannot be presumed to have authorized him to pledge his credit where no credit is to be given. The known usage is, that the officer does not receive his fee from the client, but from the attorney; and if the attorney be permitted to delay the payment of the fee, the officer looks to him and not to his client. No general inference can be drawn, from these cases, to govern that of a witness; he knows for whom his testimony is required, and his obligation is to the party; if he should fail to attend, without having an excuse, he is liable to the party who subpoenaed him, under the 5th Eliz. c. 9, s. 12, and also at common law; for he may claim a reasonable sum for his expenses of attending to give evidence, and he may refuse to attend unless they are paid; and if he be unwilling to accept an undertaking from the party, he may waive his right, and have an undertaking from the attorney. There

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seems, therefore, to be no reason to imply a contract, by the agent, where he has no interest, and can make no profit upon it in his charges to the principal. There must, in every case, be a credit to some extent for the balance. and I do not, for one, think that the attorney's liability ought to be extended. It is presumed that the party must be aware of the law that enables a witness to refuse to give evidence unless his expenses are paid; and if the client omit to furnish funds, he must be considered as authorizing the attorney to bind his credit. We are of opinion that there is no implied contract with the attorney, and that the rule for entering a nonsuit must be made absolute.

Rule absolute.

### RAWLINS v. PITT and another.

Trespass for assaulting the plaintiff and seizing and laying hold of him, and imprisoning him. The defendant pleaded the general issue, and a justification to the whole. The plaintiff obtained a verdict with 1s. damages. Held, that a battery was admitted on the record, and therefore the judge could not certify, under the 43 Eliz. c. 6.

**TRESPASS.** The declaration stated that the defendants, on, &c., with force and arms, &c., assaulted the plaintiff, and then seized and laid hold of him and forced and compelled him to go along divers public streets, to a certain lock-up-house, and there imprisoned the plaintiff, and kept and detained him in prison, &c. *Pleas*—first, not guilty; secondly, a justification under a writ of *capias*, by one defendant as sheriff, and the other acting in his aid. At the trial, before Lord Abinger, C. B., at the sittings after Trinity Term, the plaintiff had a verdict, with one shilling damages, and the learned judge certified under the 43 Eliz., c. 6, s. 2.

*Humfrey* had obtained a rule to shew cause why the master should not tax the plaintiff in full costs, notwithstanding the certificate, on the ground that a battery was admitted on the record.

*Bompas*, Serjt., and *Hoggins*, shewed cause.—In order to make out a battery, there should be the term "beat," and not merely a touching and imprisonment. In *Emmett v. Lyne* (a), the plaintiff declared for an assault, battery, and imprisonment; and no battery was proved, but only an imprisonment; and it was held that the judge had power to certify, the Court stating that all that the authorities established was, that imprisonment was a "corporal damage." A touch given by a constable's staff does not constitute a battery. *Wiffin v. Kincard* (b). [*Parke*, B.—There the touch was merely to engage the plaintiff's attention. In 2 Roll. Ab. 546, s. 7, cited in Comyn's Digest, Battery, A., it is said that "if a man comes in aid of an officer, who has a warrant against A., and says to the officer—'this is the man,' that is a battery." In *Daubney v. Cooper* (c), which was trespass for assaulting and beating the plaintiff, and turning him out of a room, it was held that, upon a verdict for one shilling, and not guilty pleaded, the plaintiff was entitled to no more costs than damages. [*Alderson*, B.—If the *impositio manum* be not a battery, why do you justify it?]

*PARKE*, B.—The plea of justification admits the words in the declaration, in the sense in which it would be necessary to prove them, in order to support the action. The question then is, whether the "seizing and laying hold" is

(a) 1 N. R. 255.

(b) 2 N. R. 471.

(c) 10 B. & C. 830.

not such a seizure as necessarily to constrain his person; if so, that is a battery. In Comyn's Digest, Battery, it is said to be a beating, if a man hold another by the arm.

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*Humfrey*, in support of the rule, was stopped by the Court.

Rule absolute (*d*).

(*d*) See *Hughes v. Hughes*, 1 Gale, 302; 4 Dowl. P. C. 432; *SmitA v. Edwards*, 1 Har. & Wol. 497; 4 Dowl. P. C. 621.

### DAVIES v. LLOYD.

**R. V. RICHARDS** obtained a rule, *nisi*, to set aside a writ of summons for irregularity, on the ground that although it appeared to have been sued out in an action of debt, there was no indorsement on it of the amount of debt and costs.

It is not necessary to indorse the amount of debt and costs on a writ sued out to recover penalties under the Municipal Corporation Act.

*Welsby* shewed cause upon an affidavit which stated the action to be brought for penalties for bribery, under the Municipal Corporation Act, (5 & 6 W. 4, c. 76, s. 54.) He contended that this was not a case which required the indorsement. It is not necessary to make the indorsement in an action on a bail-bond, *Smart v. Lovick* (*a*), or on a replevin bond, *Rowland v. Dakeyne* (*b*).

*Richards, contrà*, contended that the sum claimed was a debt, and that, therefore, there should have been the usual indorsement.

**PARKE, B.**—This is clearly not a case within the rule.

**ALDERSON, B.**—The result of the action may render the defendant not only liable to the penalty, but may disqualify him for civil offices during life.

Rule discharged.

(*a*) 3 Dowl. P. C. 34.

(*b*) 2 Dowl. P. C. 832.

### MORRELL and another v. PARKER.

**ERLE** had obtained a rule, *nisi*, for setting aside the bail-bond given in this case, on entering a common appearance. The affidavit to hold to bail stated that the defendant was indebted to deponent and *J. Morrell*, this deponent's co-partner in 200*l.* for money lent by this deponent and the said *J. Morrell* and one *Cox*, their late co-partner, to the defendant, at her request. An affidavit, in support of the rule, stated that *Cox* was still living.

*W. H. Watson* shewed cause, and contended that if an affidavit be good upon the face of it, it could not be impeached *aliunde*.

Where an affidavit to hold to bail, stated the defendant to be indebted to the plaintiffs for money lent to them and their late co-partner, the Court ordered the bail-bond to be set aside, on an affidavit that the third partner was still alive.



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PARKE, B.—How can the defendant be indebted to the two, upon a debt contracted with the three, unless one was dead? The rule must be absolute.

ALDERSON, B.—The deponent could not be indicted for perjury upon proof of the other partner being alive.

Rule absolute.

## HARRISON v. RIGBY.

An affidavit to hold to bail stated defendant to be indebted on a bill of exchange drawn and accepted by defendant, and payable to deponent, &c. Held, sufficient.

COWLING moved to set aside a writ of capias, and to discharge the defendant out of custody, on the ground of a defect in the affidavit to hold to bail. The affidavit stated that defendant was "indebted to deponent in 20*l.*, for principal money upon a bill of exchange, drawn and accepted by defendant and payable to deponent at a certain day now past, and that the same remains due and unpaid." The objection was, that the affidavit did not state who was the drawee. The defendant might have accepted it, though not originally drawn upon him.

PARKE, B.—I think there can be no mistake about it.

Rule refused.

## TURNER v. CROSBY.

Debt for goods sold, &c.

Pleas, except as to 5*l.* 16*s.* 10*d.*, *nunquam indebtedatus*; as to 1*l.* 14*s.* 8*d.*, parcel of the 5*l.* 16*s.* 10*d.*, set-off; and as to the residue, that plaintiff ought not further to maintain his action, because the defendant, when the same became due, was, and ever since has been, ready to pay the same, and that, after it became due, he was ready to tender, and offered to tender the same, but the plaintiff dispensed with an actual tender, because the matter was in the hands of his attorney. Held, that this was an informal plea of tender, and not a plea of payment into court.

THE declaration stated the defendant to be indebted in the sum of 6*l.*, for goods sold and delivered, and in 6*l.* on an account stated. Pleas—First, as to all the sums demanded, except the sum of 5*l.* 16*s.* 10*d.*, parcel, &c., *nunquam indebtedatus*; secondly, as to the sum of 1*l.* 14*s.* 8*d.*, parcel of the said sum of 5*l.* 16*s.* 10*d.*, a set-off; thirdly, as to the residue, that is to say, the sum of 4*l.* 2*s.* 2*d.*, that the plaintiff ought not further to maintain his action in respect thereof, because the defendant says, that when the same became due, he was, and has ever since been, ready to pay the same; and that after it became due he was ready to tender, and offered to tender the same, but that the defendant dispensed with an actual tender thereof, because the matter was in the hands of his attorney; and the defendant now brings the said sum of 4*l.* 2*s.* 2*d.* into Court, ready to be paid to the plaintiff, &c. &c. The plaintiff took the 4*l.* 2*s.* 2*d.* out of court, and entered a *nolle prosequi* as to that sum; and on the trial before Lord Abinger, C. B., at the *Middlesex* sittings after last term, the defendant had a verdict on the other issues.

Jervis now moved for a rule, *nisi*, to enter up judgment for the plaintiff, on the whole record, and contended that the third plea, was an informal plea of payment of money into court, and not a plea of tender. He referred to *Finch v. Brook* (a).

(a) 1 Bing. N. C. 253; Scott. 70.

Held, that this was an informal plea of tender, and not a plea of payment into court.

PARKE, B.—The whole difficulty in this case arises from the insertion of the word “further” in the plea; but can there be any doubt that it is meant to be a plea of tender, and that the word crept in by mistake. I think there should be no rule.

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The rest of the Court concurred.

Rule refused.

### CAUNCE v. RIGBY.

IN this case the affidavit to hold to bail, stated that the defendant was indebted to the plaintiff in the sum of 31*l.*, for work and labour, done by him for the defendant, at his request, and in the further sum of 20*l.*, on a bill of exchange drawn by the defendant on one *John Robinson*, and indorsed to the plaintiff, “which said *John Robinson* made default in payment of the said bill when due.”

If an affidavit to hold to bail be good as to one arrestable amount, it is no objection that it is bad as to another sum, unless it appears that process issued for the whole. *Scoble*, that an affidavit to hold to bail, in an action against the drawer of a bill ought to shew a refusal by the acceptor to pay on presentment.

*Cowling* had obtained a rule to set aside the capias on the ground that the affidavit did not contain a sufficient statement of the acceptor’s default.

*Wightman* shewed cause, and contended, that presentment and notice need not be stated in the affidavit, but that it was sufficient to allege a default in the acceptor. He referred to *Witham v. Gompertz (a)*. *Crosby v. Clarke (b)*.

*Cowling*, in support of the rule.—The affidavit should state the facts which shew such a default as to render the drawer liable, otherwise the word indebted would of itself be enough, since that infers a default by the acceptor. [*Alderson*, B.—Undoubtedly the making default as acceptor, may have a different meaning as against himself, or as against the drawer; to charge the drawer it must be a default by refusal. But is the affidavit bad as to the first part of it?] An affidavit of debt, if bad in part, is bad altogether. *Kirk v. Almond (c)*. *Baker v. Wills (d)*. [*Alderson*, B.—No doubt, if it appeared that the defendant was arrested for the whole amount, but suppose it was only for 31*l.*?] It is incumbent on the plaintiff to shew that the writ was not sued out for the whole amount mentioned in the affidavit.

ALDERSON, B.—The Court is not to assume an irregularity, until it is proved. If the writ were indorsed for 31*l.* only, what objection could there be, when there is a good affidavit to that amount? I am not aware of any case, in which, under such circumstances, the affidavit has been held bad.

Rule discharged with costs.

(a) 1 Gale, 301; 2 C. M. R. 736.  
(b) 1 M. & W. 296.

(c) 2 C. & J. 354.  
(d) 1 C. & M. 238.

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## CARTER v. SOUTHALL.

In an action against three joint makers of a promissory note the plaintiff had been able to serve two only with a copy of a rule, *nisi*, to compute, and had left a copy at the last place of abode of the other. *Held*, sufficient service.

**CROMPTON** moved to make absolute a rule to compute principal and interest on a bill of exchange. The action was brought against three joint makers of a promissory note; but the plaintiff had been able to serve two of them only, with a copy of the rule *nisi*, and had left a copy at the last place of abode of the other defendant. He referred to the case of a declaration in ejectment, where service on one of two joint tenants was held sufficient.

ALDERSON, B.—I think the service sufficient.

Rule absolute.

## HICKES v. CRACKNELL.

In debt on an annuity bond, the defendant pleaded, that no memorial of the said bond was made, according to the provisions of the 53d Geo. 3, c. 141; replication, that a memorial was duly enrolled, containing all matters required by the statute; rejoinder, that the said memorial therein set forth, contained divers false statements and representations, especially in this, to wit, that the said memorial represents, that the consideration for the annuity was paid in notes of the Bank of England, whereas in truth and in fact, the said money was not so paid or otherwise howsoever; (the rejoinder then proceeded again to aver, that there was no such memorial as required by the statute, concluding to the country:) *Held*, on special demurrer, that the rejoinder, was no departure from the plea.

**DEBT** on an annuity bond. The declaration stated that the plaintiff, therefore, to wit, on the 4th day of *January*, 1832, by her certain writing obligatory, sealed with her seal, and now shewn to the court of our said lord the king now here, the date whereof is the day and year aforesaid, acknowledged herself to be held and firmly bound unto the said *Charles Hickes* in the sum of 1200*l.*, above demanded to be paid by the defendant to the said *Charles Hickes*; which said writing obligatory was and is subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that the said *Elizabeth Cracknell* had agreed with the said *Charles Hickes* for the sale of an annuity or yearly sum of 76*l.* 2*s.* 3*d.*, during the natural life of her the said *Elizabeth Cracknell*, for the price of 600*l.*, which sum the said *Charles Hickes* had paid to the said *Elizabeth Cracknell* at the time of the sealing and delivery thereof; and for the better securing the payment of the said annuity, the said *Elizabeth Cracknell* had executed a certain indenture of grant, bearing even date with the said obligation, and made between the said *Elizabeth Cracknell*, of the first part, the said *Charles Hickes*, of the second part, and *William Henry Hough*, of the third part, whereby the said annuity, charged upon and made and issuing out of a certain hereditament, rents, and premises, therein particularly described; and the said annuity was intended to be still further secured by the said obligation; the condition of the above written obligation was declared to be such, that if the above bounden *Elizabeth Cracknell*, her heirs, executors, or administrators, or any of them, did and should well and truly pay, or cause to be paid, unto the said *Charles Hickes*, his executors, administrators, and assigns, one clear annuity or yearly sum of 76*l.* 2*s.* 3*d.*, of lawful money of the United Kingdom of *Great Britain* and *Ireland*, current in *England*, for and during the term of ninety-nine years thence next ensuing, and to be complete and ended, if the said *Elizabeth Cracknell* should so long live, free and clear from all taxes, charges, and other deductions whatsoever, by four equal quarterly payments, on the 4th day of *April*, the 4th day of *July*, the 4th day of *October*, the 4th day of *January*, in

each and every year, and also a proportionable part of the said annuity for so many days as should happen to elapse from the date of the above written obligation, or from the last quarterly day of payment thereof next preceding the decease of the said *Elizabeth Cracknell*, (as the case might be,) up to the day of her death; and did and should make the first quarterly payment of the said annuity on the 4th day of *April* then next ensuing, if the said *Elizabeth Cracknell* should then have been living, and, if not, then a proportionable part thereof, as aforesaid, immediately after her decease; then and in such case and cases the said obligation should be void and of no effect, but otherwise the same should be and remain in full force and virtue. Nevertheless, the plaintiff in fact saith, that, after the making of the said writing obligatory, to wit, on the 4th day of *October*, in the year of our Lord 1836, a large sum of money, to wit, the sum of 190*l.* 5*s.* 7*d.*, of the said annuity or yearly sum of 76*l.* 2*s.* 3*d.*, for two years and a half, which expired on the day and year last aforesaid, became and was due and owing from the defendant to the plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said writing obligatory, and of the said condition thereof; by reason of which said breach, the said writing obligatory became forfeited, and whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the sum of one thousand two hundred pounds above demanded. Yet the defendant, although often requested so to do, hath not as yet paid the said sum of money above demanded, or any part thereof, to the plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to the damage of the plaintiff of 500*l.*; and thereupon he brings suit, &c.

*Plea*—The defendant, by *Joseph King*, her attorney, says, that the said writing obligatory was made and entered into by the defendant to the plaintiff after the passing of a certain act of parliament, passed in the 53rd year of his late majesty King *George* the Third; and that the said annuity in the said condition mentioned was granted for and upon a pecuniary consideration in that behalf; and that no memorial of the said writing, containing the names of all the witnesses thereto, of the date of the said writing obligatory, of the names of all the parties thereto, or of the person for whose life the said annuity was granted, and of the person by whom the said annuity was to be beneficially received, or of the *pecuniary consideration for granting the said annuity, or how such consideration* was paid, or the annual sum to be paid thereby, was enrolled in the High Court of Chancery, according to the directions of the said act of parliament, whereby the said writing obligatory in the said declaration mentioned, is null and void; and this the defendant is ready to verify, &c.

*Replication*—The plaintiff, as to the plea of the defendant, by her above pleaded, saith, that a memorial of the said writing obligatory, in the said declaration mentioned, was, within thirty days after the execution thereof, to wit, on the 10th day of *January*, in the year of our Lord 1832, duly enrolled in the High Court of Chancery at *Westminster*, in the county of *Middlesex*, according to the directions of the said statute in that case made and provided, and which said memorial was and is as follows, to wit—[Here the memorial was fully set out, the consideration for the annuity being stated, (in the column set apart for that purpose,) to have been paid in Bank of *England* notes.]—As by the said memorial, now remaining duly enrolled in the said High Court of Chancery at *Westminster*, more fully appears. And the said plaintiff further saith, that the said memorial *did duly contain and set forth the day of the month and the year when the said writing obligatory, in the said declaration mentioned, bore date, and*

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the names of all the parties and of all the witnesses thereto, and of the person for whose life the said annuity was granted, and of the person by whom the same was to be beneficially received, *and the pecuniary consideration for granting the same, and how such consideration was paid*, and the annual sum to be paid, in the form and to the effect as in and by the said statute in that case made and provided is required, as by the said enrolment of the said memorial, remaining of record in the said Court of Chancery, at *Westminster* aforesaid, more fully appears. *And this the plaintiff is ready to verify by the said record*, when, where, and in such manner as the Court here shall order and direct.

*Rejoinder*—The defendant, as to the plaintiff's plea by way of reply to the plea of the defendant by her above pleaded in bar, says, that the said memorial therein sets forth and contains divers false statements and representations touching and relating to certain matters and facts material and essential to the validity of the said annuity, and to the maintenance of this action, and especially in this, to wit, that the said memorial imports and represents that the consideration of and for the said annuity, to wit, 600*l.*, was paid in notes of the governor and company of the Bank of *England*, whereas, in truth and in fact, the said 600*l.* was not, nor was any part thereof, paid to the said *Elizabeth Cracknell*, in notes of the governor and company of the Bank of *England*, or otherwise *howsoever*, in manner and form as the plaintiff hath, in the said plea by way of reply, alleged; and so the defendant in fact again saith, that there never was any such memorial as by the said act of parliament is required, enrolled in the said High Court of Chancery, according to the directions of the said act of parliament; and of this she puts herself upon the country, &c.

*Demurrer*—And the said plaintiff says, that the plea of the said defendant by her above pleaded by way of rejoinder, is not sufficient in law. And the plaintiff shews to the Court here the following causes of demurrer to the said plea, that is to say, that the said plea seeks to put in issue that which is matter of record, and which was vouched to be tried by record; and also that it concludes to the country upon matters which are not triable by a jury; and also that the said plea introduces new matters of fact; and yet concludes to the country, instead of concluding with a verification; and also that the matter of the said plea is a departure from the matter contained in the plea in bar; and also that the said plea is in other respects uncertain, informal, and insufficient, &c.

*Barstow*, in support of the demurrer.—The replication of the plaintiff concludes with a verification by the record; the rejoinder concludes to the country. It is, therefore, objectionable on this ground, that it seeks to put in issue in this form a matter of record, instead of pleading *nul tiel record*. That this would have been the proper course is shewn by *Richardson v. Tomkies* (a). If there had been any objection to the conclusion of the replication, it ought to have been taken on special demurrer. The defendant, not having done so, has lost an opportunity of excepting to the matter of fact; and, therefore, he was compelled, consistently with the rules of pleading, to plead *nul tiel record*. It is not necessary to go the length of saying that the memorial has all the qualities of a record; the defendant, however, has raised every objection on that score. [*Parke, B.*—All that the plaintiff says is this, that there is no

(a) 9 Bingh. 51.

such memorial as is required by the statute.] The case of *Praed v. the Duchess of Cumberland* (b) shews that such a statement is a departure. The judgment of *Buller, J.*, there contains these words:—"Nothing is clearer than that this is a departure: the defendant's argument goes to admit it. The whole question turns upon the word 'such.' Now what is the meaning of the plea in this case, or of the plea of no award, or that of no *capias ad satisfaciendum*? They tender issues in fact, not in law. We are not to require, under the allegation of 'no such memorial,' every thing that is required by the act of parliament: it is merely an issue in fact. So in the case of an award, if there be an award in fact, the party cannot, on the trial of an issue of no award, go into objections to the award in point of law." [*Parke, B.*—In the same case in error (c), Lord C. J. *Eyre* states the real reason why the rejoinder is bad, viz., that matters were contained in it which vitiated the deed and not the memorial.] It has been imagined that the case of *Fisher v. Pimbley* (d) has overturned that of *Praed v. Duchess of Cumberland*; that, however, is not so. That was debt on bond conditioned for the performance of an award; plea, no award; replication, setting out an award; rejoinder, setting out the whole award, and demurring. It was there decided that the rejoinder was no departure. The entire effect of *Fisher v. Pimbley* is this, that, supposing on the pleadings in the present case, the defendant having pleaded that there was no memorial, the plaintiff had replied, setting out the memorial, and the defendant had rejoined, setting out a defective memorial, he would be entitled so to do. In that case, Lord *Ellenborough* says, "The award being bad, the only question is, whether the defendant can shew such bad award in his rejoinder, consistently with the former allegation in his plea, that there was no award? The plaintiff, in his replication, sets out an award; and if he had set it out truly, it is clear that the defendant might have demurred to it; but, not having set it out truly, where is the inconsistency or departure from the plea, in the defendant's doing that which the plaintiff ought to have done, setting out the award in fact, and then demurring to the true award so set out." It is, therefore, submitted, that the proper course for the defendant was to have taken this objection at an earlier stage of his proceedings. *Askew v. Mackreth* (e), *Simon v. Hunt* (f), *Flight v. Buckeridge* (g), *Darwin v. Lincoln* (h).

Exchequer.  
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*PARKE, B.*—The meaning of this plea is, not that there was no memorial in point of fact, but that there was no such memorial as is required by the statute. The sole effect of *Fisher v. Pimbley* is this, that, supposing the defendant had pleaded that there was no memorial, and the plaintiff had replied, setting out a memorial; if that memorial were defective, the defendant could rejoin, setting out the entire of the memorial, and demurring. The true ground of the de-

(b) 4 T. R. 585.  
(c) 2 Hen. Black. 280.  
(d) 11 East, 188.  
(e) 1 N. R. 214.

(f) 1 Marsh, 155.  
(g) 6 B. & C. 49.  
(h) 5 B. & Ald. 444.

*Exchequer.*  
**HICKES**  
v.  
**CRACKNELL.**

cision in *Praed v. Duchess of Cumberland*, is that stated in the Court of Common Pleas; and I by no means subscribe to the opinion of the Court below.

GURNEY and ALDERSON, Bs., concurred.

*Barstow* afterwards obtained leave to amend, (on condition of producing an affidavit that the consideration money was actually paid;) otherwise judgment for the defendant.

END OF MICHAELMAS TERM.

A  
D I G E S T  
OF THE  
CASES REPORTED IN THIS VOLUME;  
CONTAINING  
THE DECISIONS OF THE COURT OF EXCHEQUER,

FROM  
HILARY TERM, 7 W. IV. 1836, TO MICHAELMAS TERM, 1 VICT. 1837, INCLUSIVE.

ADMINISTRATOR.

See EXECUTOR, AGREEMENT, 3.

AFFIDAVIT TO HOLD TO BAIL.

See VARIANCE, 2.

1. An affidavit to hold to bail stated defendant to be indebted on a bill of exchange drawn and accepted by defendant, and payable to deponent, &c.:—*Held*, sufficient. *Harrison v. Rigby*, 362.

2. Where an affidavit to hold to bail stated the defendant to be indebted to the plaintiffs for money lent to them and their late co-partner, the Court ordered the bail-bond to be set aside, on an affidavit that the third partner was still alive. *Morrell v. Parker*. 361.

3 If an affidavit to hold to bail be good as to one arrestable amount, it is no objection that it is bad as to another sum, unless it appears that process issued for the whole. *Seemle*, that an affidavit to hold to bail, in an action against the drawer of a bill, ought to shew a refusal by the acceptor to pay on presentment. *Caunce v. Rigby*. 363.

4. The Court will not try the merits of an affidavit to hold to bail on motion; but will leave the party arrested to his action. Where, therefore, the plaintiff, on an affidavit made the day after the arrest, disclosed a cause of action different from that which he had sworn to in his affidavit to hold to bail, and one upon which the defendant could not be arrested, the Court refused to order the bail-bond to be given up on entering a common appearance, but left the defendant to his action for a malicious arrest. *Vaughan v. Goarby*, 327.

AGENT.

The defendant, a clerk in the firm of B. and Co., after the death of two of the partners, being  
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employed by the survivor to wind up the partnership affairs, drew and indorsed a bill of exchange, in the name of the firm:—*Held*, that he was not liable on the bill, without some evidence that he had used the name of his principal without authority. *Wilson v. Barthorpe*, 81.

AGREEMENT.

1. The declaration stated that the plaintiff was lawfully possessed of a certain dwelling-house and premises, &c., and also of certain furniture, tenant's fixtures, &c., then being on the said premises, for the residue of a term of six years; and that the plaintiff agreed to sell and assign the said lease, with the outbuildings and premises, at a certain sum; and all the household furniture, &c., then on the said premises, at a fair valuation; and that possession should be given to the defendant on or before a certain day. It then averred that, from the time of making the agreement, the plaintiff was ready and willing to transfer the household furniture, &c. This averment was traversed. It appeared that on the day upon which the agreement was entered into, the house, together with the furniture, was destroyed:—*Held*, that upon this issue the plaintiff could not recover. *Bacon v. Simpson*, 309.

2. By an indorsement on the agreement, the day for delivering the possession was enlarged:—*Held*, that such indorsement constituted a fresh agreement: but *quære*, per *Parke*, B., whether it was of the value of 20*l.*, so as to require a stamp. *Id.*

3. The plaintiff, who was the widow of the former lessee, took out administration subsequent to the date of the agreement, and before the day appointed for the delivery of possession:—*Held*, that the taking out of administration had no relation back, so as to give the plaintiff title at the date of the agreement. But *seemle*, that if the plaintiff could make title at the time appointed, for performing the contract, an issue found that

B B



she was not possessed at the date of the agreement was immaterial. *Id.*

#### AMENDMENT.

Where a replication traversed the facts contained in the plea, and concluded to the country, without an "&c." and no similiter was added:—*Held*, that the omission was amendable as a misprision of the clerk, after verdict, judgment, and writ of error brought. *Siboni v. Kirkman*, 336.

#### ARBITRATION.

1. A cause was referred to an arbitrator, who was to be at liberty to reduce or vacate the verdict, which was taken by consent. The arbitrator awarded that the plaintiff was entitled to demand of the defendant 90*l.*, and that the defendant was entitled to set off 35*l.*; and that the defendant should deliver up to the plaintiff certain securities:—*Held*, that the award sufficiently ascertained the amount for which the verdict was to be entered. *Platt v. Hull*, 191.

2. In an action for goods sold, the defendant pleaded, as to 30*l.*, parcel, &c. payment, and as to the residue non-assumpsit. The defendant replied, that the 30*l.* in the plea mentioned, was paid on account of a different cause of action. The cause was referred, and the arbitrator found for the defendant upon the plea of non-assumpsit, and for him as to 3*l.* parcel of the 30*l.*; and for the plaintiff as to the residue:—*Held*, that the damages were sufficiently assessed. *The King v. Earl Dundonnald*, 74.

#### ARREST.

1. *Seemle*, that a party who is arrested and goes to prison, is "arrested and held to special bail," within the meaning of the 43 Geo. 3, c. 46, s. 3. *Edwards v. Jones*, 92.

2. The indorsee of a promissory note, who has given some value for it, may arrest the maker for the whole amount, notwithstanding it was an accommodation note as between the prior parties, provided the holder had no knowledge of that fact. *Id.*

#### ASSUMPSIT,

Assumpsit for the value of goods. The declaration stated an agreement between the plaintiff and defendant, whereby the defendant agreed to take certain goods, at the valuation of N. and M. It was then averred that N., on behalf of the plaintiff, was ready and willing to value for plaintiff, and requested M. to value the same; but that the defendant and M. neglected and refused so to do; that the plaintiff gave the defendant notice, that N. was ready to

meet M., or any other appraiser, on defendant's behalf, at any time within ten days which the defendant might appoint, to value the goods; that defendant refused to appoint any day for M. to value, or to nominate any other appraiser, or to take any steps to value, or cause or procure the same to be valued, and during all the time aforesaid, refused to value the goods or let the same be valued; whereupon the said N., after the lapse of one month, proceeded to value, and did value, the said goods; and the price upon such valuation amounted to 500*l.*, whereof the defendant had notice, and was requested to pay the same. Breach, that the defendant would not take the goods or pay for the same:—*Held*, on special demurrer, that the count was bad; for that the defendant was not bound by his agreement to take the goods until they were valued by M. and N., unless it was distinctly alleged in the declaration, that the defendant refused to allow M. to make a valuation. *Turnell v. Balbirnie*, 235.

#### ATTACHMENT.

1. The affidavit, upon which an attachment for not obeying a subpoena is moved for, must state affirmatively that the original was shewed to the defendant, at the time of his being served with a copy of such subpoena. *Garden v. Creswell*, 44.

2. Where a plaintiff has been prevented from going to trial by the irregularity of the defendant, the Court will order an attachment to stand as a security, within the 5th rule of H. T. 2 Will. 4, although the rule to set aside the attachment, might have been discussed and disposed of in sufficient time to have enabled the plaintiff to have proceeded to trial in due course. *Cusley v. Binns*, 42.

3. A writ of *cepias* was directed to the warden of Dover Castle, upon which he returned *cepi corpus*. A body rule afterwards issued, which expired on the 28th November. On the 6th of December, the defendant gave notice of justifying bail at chambers, which notice was returned, the plaintiff saying the warden was fixed. On the 17th, another notice was given, which was also returned; but, on a subsequent day, the plaintiff's attorney attended at chambers, protested against the irregularity of the proceedings, and took objections to the bail, which were overruled, and the bail justified:—*Held*, that the opposing the bail at chambers, was no waiver of the plaintiff's right to an attachment for not bringing in the body. *Smith v. Andrews*, 107.

4. A body rule expired on the 20th October, on which day bail came up to justify at chambers, but were rejected on account of a defect in the notice of justification. The judge made an order for three days' further time to justify, "without prejudice to the sheriff's being in contempt." An attachment having been sube-

quently obtained against the sheriff, the Court set it aside for irregularity. *Regina v. Sheriff of Middlesex*, 352.

5. The affidavit in support of a motion for an attachment for disobedience to a subpoena ad testificandum, must state that the party was a material witness. *Tinley v. Porter*, 213.

#### ATTORNEY.

1. The 2 G. 2, c. 23, s. 10, does not apply to the case of a country attorney who conducts a suit through his town agent. *Jones v. Jones*, 53.

2. The plaintiff sued for work done by him whilst an uncertificated bankrupt. The cause was ultimately referred, and the arbitrators found a sum due to the plaintiff:—*Held*, that the attorney for the plaintiff was entitled to the amount of his lien for costs as against the assignees. *Jones v. Turnbull*, 106.

3. An attorney who subpoenas a witness, is not liable for the expenses occasioned by his attendance. *Robins v. Bridge*, 357.

4. The Uniformity of Process Act has not taken away the privileges of an attorney to be sued in his own Court. *Lewis v. Ker*, 4.

5. An attorney is not entitled, on taxation, to the costs of more than one letter before action brought. *Capel v. Staines*, 265.

#### BAIL.

1. The two days' notice of bail by a defendant who is in custody, must state that the defendant is a prisoner. *Poole's Bail*, 48.

2. Bail should swear they are worth the necessary sum over *what will pay* their just debts, as required by R. H. T. 2 Will. 4, s. 19; but an omission to comply with the terms of that rule, is no objection to the bail justifying in person; but in such case, the defendant is not entitled to the costs of justification. *Miller's Bail*, 70.

3. Where time has been given to the defendant by the plaintiff, and the bail afterwards consent to further time, with knowledge of the time already given:—*Held*, a waiver on their part of the first irregularity. *Spyer v. Conpar*, 47.

#### BAIL-BOND.

In an action by the assignee of a bail-bond, it is sufficient to aver in the declaration, that the bond was duly assigned according to the form of the statute; and it need not be stated that the assignment was under the hand and seal of the sheriff, and in the presence of two credible witnesses. *Lewis v. Parkes*, 321.

#### BANKRUPT.

See EVIDENCE, 2. 3.

1. A delivery of goods, *bonâ fide* made in payment of a debt, is within the 82nd section of the 6 Geo. 4, c. 16. *Cannan v. Wood*, 76.

2. Where a party puts his name to a bill for the accommodation of another, who afterwards becomes bankrupt, that is such a giving of credit to the bankrupt within the 6 Geo. 4, c. 16, s. 50, as may be the subject of a set-off in an action brought by his assignees. *Hulme v. Mugglestone*, 344.

3. *Semble*, that a replication to plea of a mutual credit, which puts in issue not only the amount of the credits, but also the nature of the mutual claims, is bad for duplicity. *Id.*

#### BASTARD.

Where a party paid money to parish officers to exonerate him from the expenses of his bastard child, and the child died during the year they continued in office, *held*, that an action for money had and received might be maintained against those parish officers to recover the money not expended on the child, although they had quitted office, and handed over the money to their successors. *Chappell v. Poles and others*, 262.

#### BILLS OF EXCHANGE.

See PROMISSORY NOTE. AGENT. ARREST, 2. INSOLVENT.

1. To an action by indorsee against an acceptor of a bill of exchange, defendant pleaded, that after the bill became due he was ready and willing and tendered and offered to pay the amount of the bill and interest:—*Held* bad on demurrer. *Semble*, that if, when a bill becomes due, the acceptor goes to the holder's house, and cannot find him, but afterwards meets with him, and tenders the money, such a plea of tender would be good. *Poole v. Sambridge*, 32.

2. In order to prove a notice of dishonour of a bill, the plaintiff called a witness, who stated that he went to the drawer's house the day after the bill became due, and saw defendant's wife, and told her he had brought a bill which was dishonoured; she said she knew nothing about it, but would tell her husband when he came home:—*Held*, sufficient notice of dishonour. *Henrigo v. Cowe*, 54.

#### BRIBERY.

The 5 & 6 W. 4, c. 76, s. 54, creates three offences. The first is, the offence of "procuring to vote;" the second is, "corrupting," which is complete by the offer and acceptance of a bribe; the third is, "offering to corrupt."

In an action on this statute, the declaration stated, that the defendant did corrupt one J. W. to vote; and the evidence went to show, that

the offer had been made by the defendant to J. W., who, in reply, said, "It is a good job, but I have already promised the other side;" and nothing more passed between them; the judge at the trial nonsuited the plaintiff:—*Held*, that the nonsuit was wrong, and that it ought to have been left to the jury to say whether there had been an acceptance by J. W., so as to complete the offence stated in the declaration. *Harding v. Stokes*, 6.

### BROKER.

1. T., a broker in Liverpool, having been employed by J. to sell certain railway shares, agreed to sell them to S., who was M.'s broker. T.'s clerk, by mistake, entered the sale in T.'s book in the name of T. as vendor, and sent a contract-note to S.'s office containing the same error. T. shortly afterwards discovered the mistake, which he corrected by entering the name of J. in the book as vendor, and he also sent a note containing the correction to the office of S. on the same evening. Both notes were seen for the first time on the following day together by S. The first note was not demanded by T. on delivery of the second to S., neither did S. return it. An action having been brought by M. against T. for breach of his contract in not delivering the shares, the judge at the trial directed the jury that the defendant, having signed the contract in his own name, was liable to the plaintiff, although he was known to be only a broker. Evidence was tendered of a custom at L. not to insert the principal's name in the broker's note, but was rejected by the learned judge. The jury found a verdict for the plaintiff. A motion having been made for a new trial, on the ground of misdirection and of the rejection of evidence, *held*, that the direction of the learned judge was correct, and that the evidence of the usage was properly rejected. *Magee v. Atkinson and another*, 151.

### CAPIAS.

1. The omission of the date in the copy of a writ of capias is an irregularity for which the Court will discharge a defendant on entering a common appearance. *Smart v. Johnstone*, 351.

2. Where a writ of capias is lodged with the sheriff against a person in his custody on a criminal charge, there is no necessity for an order of the Court upon the sheriff to detain the defendant. *Grainger v. Moore*, 20.

### CERTIORARI.

1. If the judge of an inferior court receive a *certiorari* after the time limited by the 21 Jac. 1, c. 23, s. 2, the Court above will award a *procedendo*, although the record has been duly returned and filed. *Laveruck v. Bean*, 338.

2. *Seem*, that a writ of *certiorari* cannot be had by the claimant of goods seized under a foreign attachment. In such a case, the joinder of issue with the claimant would be a joinder of issue within the 21 Jac. 1, c. 23, s. 2; and, therefore, if the writ could be had, it must be sued out within six weeks after that issue joined. *Wait and another v. Coombes*, 328.

### COGNOVIT.

1. Judgment signed upon a cognovit, before appearance entered, is irregular. *Watson v. Dore*, 83.

2. Where the party to a cognovit died in Hilary Term, the Court refused, in Easter Term following, to permit judgment to be entered *non pro tunc*. *Man v. Lord Audley*, 96.

3. Where a cognovit is given, with liberty, in case of default in payment of the debt and costs, to enter up judgment for *debt and costs*, it is irregular to sign judgment before the costs are taxed, unless the plaintiff means to waive his right to costs; in which case he should give the defendant notice of such intention. *Booth v. Parker*, 354.

### COMPENSATION.

By the 9 Geo. 4, c. 98, the undertakers of the *Aire and Calder* navigation were empowered to make a canal from one part of the river *C Calder*, to communicate with the river at another point, and also to construct a rail-road from such cut to the highway between *Leeds* and *Wakefield*, and for such purposes to enter upon lands, making satisfaction as therein mentioned; provided, that in case of any dispute or differences between the undertakers and the parties interested in the lands, a jury should be summoned, who should assess and ascertain the sum or sums of money to be paid for the purchase of such lands, and also what other separate and distinct sum or sums of money should be paid by way of recompense either for the damages which should or might before that time have been sustained as aforesaid, or for the future temporary, or perpetual continuance of recurring damages, which should have been occasioned as aforesaid, and the cause or occasion of which should have been only in part obviated, repaired, or remedied by them. It was also provided, that the undertakers should agree for, or cause to be valued and paid for, the lands which they were empowered to purchase, within five years after the passing of the act, and that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years.

A dispute having arisen as to the value of a piece of land, a jury was summoned, and assessed the value and future damages as follows: value of the land, 6*l.*; present damage, 0; future damages, 2800*l.*

*Held*, first, that the assessment of future damage was void.

Secondly, that, unless the undertakers had finally abandoned their intention of making the cut in the parliamentary line, they had a right, at any time within the fifteen years, to take possession of the land in question, on payment or tender of 6*l.*, and that they had a right to go on simultaneously, with the making both of the cut and the rail-road. *Lee and others v. Milner, Bart., and others*, 275.

CONTRACT.—See COVENANT.

### CONVICTION.

The 1 & 2 W. 4, c. 32, directed that penalties for offences against that act should be paid to the overseer of the parish for the use of the county rate; the 5 & 6 W. 4, altered this application, and directed that one moiety of the penalty should be paid to the informer, and the other moiety to the overseer:—*Held*, that a conviction directing the whole penalty to be paid to the overseer, to be by him applied according to the direction of the statute in such case made and provided, was bad; and that the defendants were liable to an action for an imprisonment under it. *Griffith v. Harries*, 8.

### CORPORATION.

1. A lease by a corporation sole of lands already in mortmain, is not affected by the provisions of the statute 9 Geo. 2, c. 36, s. 1. *Walker v. Richardson*, 251.

2. The Municipal Corporation Act, 6 W. 4, c. 76, s. 92, does not empower the council of a borough to make a retrospective rate. *Wood v. Read*, 256.

### COSTS.

See ATTORNEY, 5. PLEADING, 4. TAXATION, 4.

1. A statute provided, that if an action should be brought against any person for any thing done in pursuance of that act, and the plaintiff became nonsuit, the defendant should recover treble costs. In a case within this act, the plaintiff became nonsuit, and afterwards and before the sittings of the Court in banc, the statute was repealed:—*Held*, that the Court could not award treble costs. *Charrington v. Meatheringham*, 30.

2. Trespass for assaulting the plaintiff and seizing and laying hold of him, and imprisoning him. The defendant pleaded the general issue, and a justification to the whole. The plaintiff obtained a verdict with 1*s.* damages. *Held*, that a battery was admitted on the record, and therefore the judge could not certify, under the 43 Eliz. c. 6. *Rawlins v. Pitt*, 360.

3. The defendant was superseded for not being charged in execution in due time, and the plaintiff having brought an action on the judgment, the defendant obtained time, and then pleaded a false plea; the Court refused to allow the plaintiff costs, the 43 Geo. 3, c. 46, s. 4, giving no power to separate them. *Hall v. Pierce*, 83.

4. On a judgment of interpleader, neither party is entitled to costs. *Plummer v. Leigh*, 152.

5. Where judgment was signed and execution issued in vacation, the Court permitted a suggestion to be entered to deprive the plaintiff of costs, the application having been made on the first day of the following term, and the defendant paying the costs incurred since the judgment. *Heale v. Earle*, 74.

### COSTS, SECURITY FOR.

1. Where a plaintiff became bankrupt after a rule nisi for judgment as in case of a nonsuit, the Court required him to give security for costs. *Taylor v. Montague*, 45.

2. It is not necessary that the residence abroad of a plaintiff should be permanent in order to entitle a defendant to call upon him for security for costs. *Lovell v. Meadows*, 45.

### COUNTERMAND, NOTICE OF.

Where the plaintiff gives short notice of trial, there can be no countermand. *Doncaster v. Cardwell*, 95.

### COURT OF REQUESTS.

See COUNTY COURT.

To debt for goods sold and delivered, the defendant pleaded the Westminster Court of Request's Act, (23 Geo. 2, c. xxvii.) averring that he was not indebted to the plaintiff in the sum of 40*s.* Replication, that defendant was indebted in a larger sum than 40*s.*; upon which issue was joined, and a verdict found for the defendant. After plea, the 23 Geo. 2 was repealed by the 6 & 7 W. 4, c. cxxxvii:—*Held*, that the plaintiff was entitled to judgment *non obstante veredicto*. *Warne v. Beresford*, 266.

### COUNTY COURT.

See COURT OF REQUESTS.

1. It is not necessary, in order to bring a case within the Middlesex County Court Act, that the plaintiff should reside within the county. *Pritchard v. McGill*, 79.

2. The judge who tries a cause under a writ of trial has no power to certify, under the 19th section of the 23 Geo 2, c. 33, that the freehold or an act of bankruptcy came in question. If that be the case, it should be shewn as cause against the order for the writ of trial. *Id.*

3. Where an affidavit to enter a suggestion on the roll to give defendant his costs under the *Middlesex* County Court Act, merely stated that the defendant resided in *Middlesex*, without specifying the place of his residence; *held*, that an affidavit in answer, stating that the defendant did not reside in *Middlesex*, was sufficient. *Balls v. Palmer*, 46.

### COVENANT.

Plaintiff assigned the good-will of his business as a carrier to defendants, and covenanted with them not to carry on trade on his own account during life, and also to serve defendants for life, and defendants covenanted with plaintiff to pay him a certain weekly sum:—*Held*, that the contract not to trade during life was legal. When a deed contains several independent covenants, some of which are illegal and void, the others may nevertheless be enforced. *Wallis v. Day*, 22.

### COVENANT TO STAND SEISED.

See DEED, 1.

### DEATH.

Where a party has been absent without having been heard of for seven years, the presumption of law then arises that he is dead; but there is no legal presumption as to the time of his death. *Nepean, Burt., v. Doe, d. Knight*, (in error,) 291.

### DEED.

1. A., and B., her daughter, being respectively seised in fee of certain lands, by indenture, dated 15th November, 1822, after reciting that a marriage had been agreed upon between the defendant and B., it was witnessed, in consideration of 2*l.* to be paid by the defendant, and in consideration of the said intended marriage, and also in consideration of 10*s.*, to A. and B. paid by L. L. and D. D., the said A. and B. did respectively grant, bargain, sell, alien, enfeoff, and confirm to L. L. and D. D. their respective portions of the lands, to hold the same to the said L. L. and D. D., to the use of the defendant for life, with remainder over. The defendant married B. shortly after the execution of the deed, and went to reside with A., and continued in possession of the premises up to the time of trial. A. died in 1831, and B. in 1835. The deed contained an indorsement of livery

of seisin, but there was no evidence of livery having been made, nor did it appear that the trustees were in any way related to the grantors:—*Held*, that the deed operated as a covenant to stand seised to the use of the defendant. *Doe d. Lewis v. Davies*, 98.

### DEMURRER.

1. Declaration on a promissory note, whereby the defendant promised to pay the plaintiff 30*l.* 13*s.* 6*d.* by instalments of 2*l.* per month, until the whole was paid; with a proviso, that if any one instalment should be unpaid, the defendant promised to pay the whole sum of 30*l.* 13*s.* 6*d.* to the plaintiff or his order, on demand, or so much thereof as should remain unpaid. The declaration contained an averment that two defaults were made by the defendant, whereby the defendant became liable to pay the sum of 30*l.* 13*s.* 6*d.*, according to the tenor and effect of his note. General demurrer, assigning for cause, that on the default of payment of the instalments, the entire sum did not become payable without an express demand:—*Held*, that the instalments being clearly admitted to be due, the demurrer was too large.—*Teague v. Morse*, 156.

2. A declaration in case for seduction of the plaintiff's daughter by the defendant (the daughter being an apprentice to the wife of the defendant,) is bad on special demurrer, as not showing a loss of service, or any contract, express or implied, on the part of the defendant, to take care of the daughter's morals. *Harris v. Butler*, 117.

3. The second rule of H. T. 4 W. 4, applies as well to special as to general demurrers; but if the demurrers be special, it is sufficient to refer in the margin to the causes assigned. *Lindus v. Pound*, 27.

### DISCONTINUANCE.

Where a defendant has become bankrupt, the plaintiff must either prove his debt or have his claim entered on the proceedings under the commission, to entitle him to discontinue his action, under the 96th section of the 6 Geo. 4, c. 16. *Augarde v. Thompson*, 105.

### DISTRESS.

See LANDLORD AND TENANT, 6.

### DISTRINGAS.

The affidavit, upon which a distringas to compel an appearance was obtained, contained a statement that the defendant was abroad; the plaintiff entered an appearance for the defendant, and signed judgment:—*Held* irregular, as the proper course was to have proceeded to outlawry. *Partridge v. Walbank*, 243.

## EJECTMENT.

1. It is not necessary in the Court of Exchequer to enter an appearance for the casual ejector before signing judgment, nor will the costs of such entry be allowed. *Doe d. Morgan v. Roe*, 72.

2. The title of the affidavit of service, in a motion for judgment against the casual ejector, is sufficient, if it contains the names of all the lessors, without stating the demises with the same particularity as in the declaration. *Doe d. Bankes v. Roe*, 4.

3. The doctrine of non-adverse possession is done away with by the 3 & 4 Will. 4, c. 27, ss. 2, 3, except in cases provided for by the 15th section. *Nepean, Bart., v. Doe, d. Knight*, (in error,) 291.

4. The service of the declaration on a servant of the defendants on the premises, is not of itself sufficient to entitle the plaintiff to a rule nisi for judgment against the casual ejector. *Doe d. Lord Dinorben v. Roe*, 140.

## ERROR.

1. The new rules H. 2 W. 4, s. 83, and H. 4 W. 4, s. 9, do not apply to errors in fact. A writ of error *coram vobis* operates as a superseas from the time it issued out, and not from the time of allowance only. *Levi v. Price*, 158.

2. The 6 Geo. 4, c. 96, s. 1, as to bail in error, does not apply to errors in fact. *Id.*

## EVIDENCE.

1. In trover against the sheriff, the warrant under which goods were seized under a *fi. fa.*, was not produced at the trial, nor was notice to produce it given. The bailiff who made the levy was proved to have delivered the warrant to his son; the son could only state his belief that he had either returned it to his father or to the sheriff's officer. It was alleged to be the custom to deliver the warrant to the auctioneer, to be by him forwarded, together with the auction sheet, to the supervisor of the district, whose duty it was to transmit them to the head office of excise in London. Search had been made for it among the bailiff's papers, and at the sheriff's office; as also among the auctioneer's papers, and at the head office of excise: but the supervisor was not called, and no proof was given of a search among his papers:—*Held*, that sufficient proof was given from which the loss of the warrant might be inferred, so as to let in secondary evidence to connect the sheriff with the act of the bailiff. *Minshall v. Lloyd*, 125.

2. An IOU, bearing date before the bankruptcy, is no evidence of a petitioning creditor's debt, unless it is shewn to have been in existence before the bankruptcy. *Wright v. Lainson*, 202.

3. Semble. That where in an action against the sheriff for a false return, he sets up the bankruptcy of the debtor as a defence, the petitioning creditor who has not indemnified the sheriff, is a competent witness. *Id.*

4. A. & Co. were bankers at Calcutta. The defendant became a partner in the firm in the year 1816, and continued a partner until the year 1822. During all this time, and for some years subsequently, the plaintiff was a creditor of the firm. The plaintiff had been for many years in India, but had returned to England, and resided at Hythe, at and after the time the defendant ceased to be a partner. No formal notice was given to the plaintiff of the defendant's retirement from the partnership, but an advertisement to that effect was inserted in the gazette in India. During the time the defendant was a partner, and subsequently, the firm had sent to the plaintiff circular letters, stating the rate of interest they allowed on deposits. It further appeared that the defendant had inserted advertisements in two newspapers which were taken in at a reading-room to which the plaintiff subscribed, stating defendant's intention to be a candidate for an East India directorship. In the year 1831, the plaintiff executed a power of attorney to the house of A. & Co., in which the names of all the partners were mentioned; and in the year 1833, he executed another power of attorney to a person who had become one of the partners of the firm of A. & Co. to prove his claim against the firm, which had failed:—*Held*, per Lord Abinger, C. B., Parke and Alderson, Bs., Bolland, B., dissentiente, that this was sufficient evidence to go to the jury that the plaintiff had knowledge of the defendant having left the firm. *Hart v. Alexander*, 63.

5. The plaintiff declared on an agreement by the defendant to purchase certain fixtures, at a valuation to be made by J. C. The defendant pleaded, that J. C. did not value the fixtures. The valuation was in fact made by A., who was in the employ of J. C., of which the defendant was aware, and made no objection until he was told the amount of the valuation:—*Held*, that in order to support the issue, the plaintiff must prove an agreement that A.'s valuation should be taken as J. C.'s; and that if it was intended to substitute A. for J. C., the declaration should have been framed accordingly. *Ess v. Truscott*, 75.

6. The plaintiff claimed the whole bed of a stream which flowed between his and the defendant's farm. The plaintiff's farm extended lower down on the one side of the stream than the defendant's, and terminated opposite another farm, called C., which adjoined the defendant's, and which was bounded by the same continuous hedge:—*Held*, that acts of ownership, exercised by the plaintiff on the bed and banks of the stream, and on the hedge at the farm C., were admissible in support of the plaintiff's claim. *Jones v. Williams*, 51.

## EXECUTOR.

See PRACTICE, 7.

1. An executor, after paying the debts of the testator, of which he had notice, invested certain parts of the residue in the funds, and on mortgage security, in his own name, for the benefit of the legatees, and paid them the dividends:—*Held*, that the executor could not be considered as having apportioned the residue in payment of any legacies, so as to bar the claim of a specialty creditor, although he had no notice of such claim till fifteen years after the testator's death. *Smith v. Day*, 185.

2. A. agreed with B., by a written agreement, that B. should have A.'s tenement for 20*l.* a-year, and the whole of A.'s keep and maintenance, during the life of B.; the said B. to take off the stock at 75*l.* 10*s.* B. took off the stock, and had possession of the tenement for his life:—*Held*, that the executrix of B. was liable, in an action of *indebitatus assumpsit* for goods sold and delivered, for the 75*l.* 10*s.*, the price of the stock.

3. *Held*, also, that as the document amounted only to an agreement to grant a future lease, and not to a present demise, it was properly stamped with a 1*l.* stamp. *Stone v. Rogers*, 146.

4. Executors are *prima facie* liable to the payment of costs if they fail in an action; and it is not enough, to exempt them, to shew that they brought the action *bona fide*. *Lewis v. Marfelt*, 5.

## FALSE IMPRISONMENT.

The plaintiff had been arrested by the defendant in two actions. In one of the actions the defendant had received authority to discharge him out of custody, but detained him for an hour:—*Held*, that as there was no proof that he was detained longer than the defendant was justified in detaining him on account of the other action, that no action lay against the defendant for false imprisonment. *Blessley v. Sloman*, 304.

## FIXTURES.

A., the tenant for life in 1824, leased to B., the remainder-man, for twenty-one years, a colliery, with a power of re-entry by the lessor for non-payment of rent, or on insolvency of lessee. B. erected steam-engines, which were affixed to the freehold in the ordinary way, and in the year 1827, having borrowed 850*l.* of C., assigned the colliery, together with the steam-engines and other implements used in the working of it, to the plaintiffs, as trustees in trust, to permit B. to have the use of them, and to remain in possession until default made by him in the payment of an annuity which he had granted to C. A. brought ejectment to recover the premises under the power of re-entry, and possession was deli-

vered in the month of June, 1829. In November, 1829, the steam-engines and other implements were seized under a *fi. fa.* issued by an execution creditor of B.:—*Held*, that the steam-engines, although removable by B. during his tenancy, had, on the re-entry of A., become fixtures which vested in the lessor, and that the plaintiffs, who could only recover in right of B., could not maintain trover for them against the sheriff. *Held*, also, that B.'s having remained in possession after default in payment of the annuity, by reason of the omission of the trustees to enter, did not render the assignment invalid. *Minshall v. Lloyd*, 125.

## FRAUDS, STATUTE OF.

The plaintiffs' agent agreed with the defendant for the sale of certain hops, when the defendant made an entry in a book of his own, commencing "Sold John Dodgson, &c." This entry was signed by the plaintiffs' agent, at the defendant's request:—*Held*, a sufficient memorandum in writing to satisfy the Statute of Frauds. *Johnson and others v. Dodgson*, 271.

## FRAUDULENT PREFERENCE.

C., who had an account with L. and Co., bankers, was a director of an insurance company, who also banked with L. and Co. The latter being about to stop payment, one of the partners, who had married a daughter of C., communicated to C.'s son the embarrassed state of the firm, and it was agreed that C.'s private account only should be drawn out, and C.'s son was requested not to inform any other person. One of the partners subsequently told C. that the bank must stop. In consequence of these communications the assurance company drew out their money. The jury having found that there was no intention to give the assurance company a preference, the Court refused to disturb the verdict. *Belcher v. Jones*, 34.

## HORSE-RACING.

1. Where the rules of certain races provided that all disputes should be settled by the stewards:—*Held*, that the plaintiff could not recover the stakes upon an award in his favour by one steward, although the other had stated he would acquiesce in whatever his colleague did. To make the award of one steward available, there must be clear evidence that both parties, and also the stakeholder, consented to abide by his sole decision. *Murriott v. Broderick*, 96.

2. *Seemle*, that where a horse-race is legal, a party cannot recover back his stake after the race has been run, though the stakeholder has not paid over the money: at all events, he must demand it before the race is run. *Id.*

## HUSBAND AND WIFE.

1. An action was commenced against a feme sole; between the service of the writ and declaration she married; the plaintiff proceeded to judgment, and sued out a *capias ad satisfaciendum* against her, and took her in execution. The affidavit, upon which it was moved to discharge her out of custody, stated that no settlement had been made upon the marriage, but did not state that she had no separate property:—*Held*, that on this affidavit she was not entitled to her discharge. *Evans v. Chester*, 243.

2. A counterpart of a deed of separation is not such a necessary for the wife as to entitle her trustee to sue the husband for the costs of it. *Lud v. Syme*, 27.

## INCLOSURE ACT.

1. By an inclosure act passed in the year 1813, the commissioners were empowered to set out, allot, and award any lands within the parish of A., in exchange for any other lands within that parish, provided (among other things) "such exchanges were made with the consent of the owner or owners, proprietor or proprietors, of the lands which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee simple, tail, for life or lives, terms of years absolutely, or for term of years determinable upon a life or lives," upon such consent; to be testified under his or their hand or hands in writing. Lands in mortgage had been exchanged under this act, and the award of the commissioners set forth the consent of the mortgagor who remained in possession, but it did not appear that the consent of the mortgagee had been obtained:—*Held*, that as the Court were not called upon to presume that the mortgagee had not given his consent, it was unnecessary to decide whether such consent was essential. *Goodtitle d. Baker v. Milburn*, 207.

2. In ejectment by the mortgagee against the assignee (under the Lords' Act) of the mortgagor:—*Held*, that a letter from the mortgagor to the mortgagee, dated before the assignment, as against the defendant, was *prima facie* evidence of having been written at the time it bore date. *Id.*

## INSURANCE.

1. Two vessels, the *Fruiter* and the *King George*, sailed from *Malaga* for *London*. the former on the 9th, the latter on the 10th of *October*. A policy of insurance was effected on the *King George* on the 3rd of *November*, warranting her departure from *Malaga* on the 10th of *October*. The two vessels were together off *Oporto* on the 21st of *October*, after which they

encountered a storm. The *Fruiter* arrived on the 30th of *October*. This latter circumstance was known to the underwriters; but the insurer had concealed from them that the vessels had parted company off *Oporto* on the 21st. The *King George* was lost on the 25th of *October*. In an action on the policy, the jury having found a verdict for the plaintiff, and that the fact concealed by the insurer was immaterial, a new trial was granted. *Westbury v. Aberdeen*, 49.

2. Assumpsit on a policy of insurance on the goods of a vessel called the *Clipper*, at and from *Liverpool*, to any port or ports, place or places of landing and trade, on the coast of *Africa* or *African* islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at ports or places backwards and forwards without being deemed any deviation, with liberty for the said ship in that voyage to proceed and sail to, and stay at, any port or places whatsoever, and with leave to load, unload, &c., goods, wheresoever she might proceed to, with any ships, boats, &c. in loading and unloading, included, particularly with liberty to tranship on board any vessel or craft in the same employ. And by a memorandum it was agreed, that the vessel might be used as a tender to any other ship or vessel in the same employ. The vessel arrived at *Benin*, and stayed there twelve months, during which time another vessel of the plaintiff's having struck on a bar at the mouth of the river, she was employed in carrying the cargo of that vessel to *Cameroones*, and, on her return home, was lost. *Held*, that the carrying the goods to *Cameroones* was not an act of tendering within the meaning of the policy. *Held*, also, that it was a proper question for the jury, whether her stay at *Benin* was unreasonable or not; and, they having found that it was, the verdict was warranted by the evidence. *Hamilton and others v. Sheddum*, 334.

## INTEREST.

Where goods were sold to be paid for by a bill at two months:—*Held*, that in an action for goods sold and delivered, brought after the time when such bill would have become due, the jury were properly directed to allow the interest which would have been payable on the bill, as, part of the price of the goods. *Farr v. Ward*, 274.

## INSOLVENT.

If an insolvent debtor inserts in his schedule the holder of a negociable security, he is discharged as to all parties, though not named, and also as to the debt for which it was a security. *Boydell v. Champneys*, 84.



## INTERPLEADER ACT.

1. A. sold cattle to B., for which B. paid by an acceptance, in which a blank was left for the drawer's name, and which he remitted through the post to A. D. & Co. afterwards received this bill, (purporting to be in the name of A., as drawer and indorser, for a valuable consideration. A. denied that he had ever received the bill, or that he had ever authorized payment by an acceptance, and also stated that the drawing and indorsement were forgeries. A. having brought an action against B. for the debt, and D. & Co. having threatened to sue him also upon the bill:—*Held*, that B. was not entitled to relief under the Interpleader Act. *Farr v. Ward*, 244.

2. The sheriff must apply to the Court under the Interpleader Act, within such time in the term following the claim, as to enable the parties to show cause in that term, and if he is guilty of laches, the rule will be discharged, or he must pay the costs of both parties. *Beale v. Overton*, 172.

3. A sheriff who has abstained from seizing goods on the premises of a defendant, in consequence of a claim being made thereto, and who, consequently, at the time of applying to the Court, has not possession of the goods, is not entitled to relief under the Interpleader Act. *Holton v. Guntrip*, 324.

## ISSUE.

The issue mis-stated the date of the writ, used the word defendant, instead of defendants, and concluded with "thereupon the then sheriffs are commanded," &c.:—*Held*, that the issue was not irregular, but merely informal; and that the defendant should have applied to a judge at chambers, to amend it at the plaintiff's cost. *Ikin v. Plevin*, 90.

## JUDGMENT, ARREST OF.

See LANDLORD AND TENANT, 5.

JUDGMENT AS IN CASE OF A  
NONSUIT.

1. Where there has been no notice of trial, the defendant cannot move for judgment as in case of a nonsuit, until after two terms, in a town cause, and two assizes in a country cause. *Smith v. Miller*, 323.

2. In a town cause, where issue has been joined in vacation, the defendant cannot move for judgment as in case of a nonsuit, until two actual terms have elapsed after issue joined. *Gough v. White*, 157.

3. The plaintiff having made default in trying

his cause on the 10th of April, gave a fresh notice of trial for the 19th, when the cause was taken as undefended, and the plaintiff had a verdict. On the 14th of April the defendant moved for judgment as in case of a nonsuit, having given but one day's notice of the motion:—*Held*, that the Court could not give judgment as in case of a nonsuit. *James v. Howe*, 90.

4. One day's notice of motion for judgment as in case of a nonsuit, is not a stay of proceedings in this Court. *Id.*

## LANDLORD AND TENANT.

## See EVIDENCE.

1. By agreement, dated 8th of September, the defendant let to the plaintiff certain premises for seven years, at an annual rent, payable quarterly, the first payment to be made on the 25th of March then next following:—*Held*, that the defendant could only distrain for one quarter's rent on the 25th of March. *Hutchins v. Scott*, 194.

2. A broker went to the plaintiff's house for the purpose of making a distress, when the plaintiff paid to him, under protest, the rent claimed and expenses of levy; upon which the broker withdrew, without seizing the goods or making an inventory:—*Held*, that, in an action for an excessive distress, the landlord could not say that there had been no distress. *Id.*

3. The defendant let to the plaintiff a house, described in the agreement as No. 38. After the execution of the agreement, and whilst it was in the plaintiff's possession, the number was altered to 35, but it did not appear by whom: No. 35 was, in fact, the house let:—*Held*, that in an action for an excessive distress, the demise was admitted upon the plea of not guilty, and that the altered agreement was evidence of the terms of the holding. *Id.*

4. A., B., and C., before the marriage of C., entered into an agreement, dated the 25th of December, 1834, to rent a house of the plaintiff for seven years. This agreement was never signed by the plaintiff. In September, 1835, C. married, and, in the following December, A. became bankrupt. The defendants proved payment by A.'s assignees of the quarter's rent, due at Michaelmas, and that the plaintiff had admitted the receipt of the two previous quarters, but it did not appear when or by whom these latter payments were made:—*Held*, that there was no evidence from which a yearly tenancy could be inferred, so as to charge all the defendants, as it was not shown that the payments were made before C.'s marriage, or with her assent after her marriage. *Doidge v. Bowers*, 170.

5. In an action by a landlord against a tenant, the declaration stated a breach "that the defendant, contrary to the agreement in the lease,

threatened to commit waste unless he received a certain sum from the incoming-tenant, and that the tenant was, in consequence, compelled to pay the said sum to prevent him from so doing:—*Held*, bad. General damages having been assessed where one of the breaches in the declaration was bad, the Court refused to arrest the judgment, but granted a *venire de novo*. *Leach v. Thomas*, 119.

6. A. being seised in fee, granted a lease to B. for sixty-one years, and afterwards granted a lease to C., to take effect at the expiration of the first lease:—*Held*, that A. had not parted with the reversion so as to prevent him from distraining for rent due from B. *Smith v. Day*, 185.

7. The lessee of premises demised under seal, required the lessor to make certain alterations and additions, and in consideration thereof paid an increased rent. The lessee afterwards became bankrupt, and his assignees took possession of the premises:—*Held*, that the assignees were not liable for the increased rent. *Lambeth v. Norris*, 29.

#### LEGACY.

A testator by his will, which took effect in 1791, devised the residue of his personal estate, (after the payment of his just debts and legacies,) as also the real estates of which he was seised as mortgagee in fee, to trustees, upon trust, to convert the whole into money, and lay it out in the purchase of real estate, to be conveyed to the same trustees, to and upon the same uses and trusts as were therein-before declared concerning his real estate. The will also directed, that, until such real estate was purchased, W. V. and W. M., the executors, should lay out the residue, at interest, on mortgage of real estate, in their own names; or, if such could not be procured, then at interest in the public funds; and the dividends and interest were directed to be paid to the parties who would, under his will, be entitled to the profits of the real estates so directed to be purchased. The executors took upon themselves the burden of the will, and, in the year 1792, and before the passing of the 36 Geo. 3, c. 52, invested the residue, which amounted to 14,000*l.* on mortgage. W. V. died, leaving W. M. the surviving executor. W. M. died in 1825, and appointed the defendants his executors. The money had never been laid out in the purchase of real estate. A suit was instituted, in order to ascertain the right heir of the original testator; and, upon his being ascertained, the defendants, as executors, paid over to him the residue of the personal estate:—*Held*, that this was a legacy, given by the will of a person dying before the 5th of April, 1805, and paid, satisfied, or discharged after the 31st of August, 1815, within the 55 Geo. 3, c. 184, and was liable to the payment of a legacy duty under that act. *The Attorney-General v. Handcock*, 159.

#### LIMITATIONS, STATUTE OF.

1. The defendant being indebted to the plaintiffs in a considerable sum of money, gave them two promissory notes in payment, which were dishonoured when they arrived at maturity. In 1827, the debt due to the plaintiffs amounted to 2245*l.*; and it was agreed that the defendant should discharge that amount by his draft for 245*l.*, which was paid, and also by annual payments of 300*l.* out of his salary as a consul, together with the proceeds of certain wines which he had consigned to India. The overdue promissory notes were also to stand as a security for the payment of the account. The defendant having made default in payment of one of the instalments of 300*l.* in the year 1830:—*Held*, that the plaintiffs were remitted to their original right of action, and that they might sue the defendant at any time within six years of his default in 1830, either upon the promissory notes or upon an account stated. *Held*, also, that a bill operates as part payment, so as to take a case out of the Statute of Limitations from the time of its delivery, and not from the time of payment. And *quære*, whether a part payment by an agent operates as an acknowledgment, so as to take a case out of the Statute of Limitations. *Irwing and another v. Veitch*, 313.

2. Where a note is payable on demand, with interest, the Statute of Limitations runs from the date of the note. *Norton v. Ellum*, 69.

#### LIVERY OF SEISIN.

*Seemle*, that no possession short of twenty years is sufficient to warrant a jury in presuming livery of seisin. *Doe d. Lewis v. Davies*, 98.

#### MASTER AND SERVANT.

In an action on the case, the declaration stated that the plaintiff was a servant of the defendant, in his trade of a butcher, and that the defendant ordered the plaintiff, as such servant, to take certain goods of the defendant in a van, driven by another servant of the defendant; that the plaintiff was accordingly being conveyed by the said van, with the said goods, and it became the duty of the defendant to use due and proper care that the said van should be in a proper state of repair, and that it should not be overloaded, and that the plaintiff should be securely carried thereby; nevertheless that, in consequence of the defendant's want of care, the van broke down, and the plaintiff's leg was broken:—*Held*, on motion in arrest of judgment, that the declaration was insufficient, as there was nothing in it to show that the defendant was liable by law. *Priestly v. Fowler*, 305.

## MONEY HAD AND RECEIVED.

See BASTARD.

Where disputes between A. & B. touching certain leasehold property had been referred to the master, he awarded, that the property in question should be sold by the defendant, an auctioneer, and the proceeds paid over in certain proportions to A. & B. The former owner of the property had died intestate, and B. had undertaken to take out administration to him, and so make title to a purchaser. Before administration had been taken out, A. & B. jointly authorized the defendant to sell the property, and A. was declared the purchaser, and paid into the hands of the defendant 8*l.* 7*s.* 10*d.* as a deposit; he moreover entered on the premises, and obtained attornment from the tenant in possession. Subsequently, B. being unable to procure the letters of administration, A. rescinded the contract, and brought money had and received against the defendant to recover the deposit:—*Held*, that the action will lay; and that no notice was necessary from the plaintiff to the defendant of the rescinding of the contract, as it was a fact equally within the knowledge of both plaintiff and defendant. *Duress v. Cafe*, 1.

## MUTUAL CREDIT.

See BANKRUPT.

## OVERSEER.

The defendant, an assistant overseer of the poor, being ordered by the vestry to supply a pauper with a coat out of the parish funds, furnished him with one on his own account. *Held*, that he was not liable to a penalty of 1*l.* within the 55 Geo. 3, c. 137, s. 6. *Henderson v. Sherburne*, 40.

## OUTLAWRY.

See DISTINGAS, 1.

## PARTICULARS OF DEMAND.

1. The particulars of demand stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiffs would rely on the whole or any part of the declaration for the recovery thereof:—*Held*, that, under this particular, the plaintiffs might give evidence in support of the second count. *Hay and another v. Fisher*, 286.

2. In an action for goods sold, the plaintiff, by his particular, claimed a sum for goods sold in the month of *January*. The evidence produced was of goods sold in the month of *May*, and it

appeared that the defendant had dealt with the plaintiff for six months previous to that period, but all goods had been paid for up to the month of *May*. A verdict having been found for the plaintiff, the Court refused to set aside the verdict, on the ground that defendant was misled. *Hemming v. Crisp*, 28.

3. Particulars of the plaintiff's demand stated the action to be brought to recover the deposit paid upon the purchase of an estate, to which the defendant was unable to make a good title; a summons was taken out for better particulars, which was dismissed, on the plaintiff's attorney stating that the objections were matters of law only; subsequently, a notice was sent to the defendant, that the objections were set out in a bill filed for specific performance. The objection at the trial was matter of fact only. A verdict having been found for the plaintiff, the Court refused to set it aside, it not appearing that the defendant had been misled. *Correll v. Cattle*, 89.

4. In an action by indorsee against the acceptor of two bills of exchange for 450*l.* each, the declaration contained two counts on the bills only. The plaintiff arrested the defendant for 240*l.*, and on the capias was an indorsement that the plaintiff claimed 260*l.* 6*s.* 4*d.* for debt. The particulars state the action to be brought to recover 500*l.* due upon the bills set forth in the declaration:—*Held*, that the defendant was entitled to further and better particulars of the plaintiff's demand. *Alderson, B. dissentiente*. *Daves v. Austruther*, 268.

5. In assumpsit for wages, the plaintiff, in his particulars, claiming 15*s.* per week, gave credit for money paid. The defendant, contending that the plaintiff was only entitled to 7*s.* per week, gave the particulars in evidence, without a plea of payment, to shew that the balance alone was claimed by the plaintiff. The jury having found that the plaintiff's wages were only at the rate of 7*s.* per week, (thereby destroying the balance claimed,) gave a verdict for the defendant:—*Held*, that the particulars were properly received in evidence as an admission of payment. *Held*, also, that the defendant having omitted to object, at the trial, that payment, unless pleaded, could not be given in evidence in bar, but only in reduction of damages, the verdict ought not to be set aside. *Kenyon v. Wakes*, 260.

6. In assumpsit for use and occupation, the amount claimed in the declaration was 105*l.* The plaintiff's particulars were 52*l.* 10*s.*, being the balance of one year's rent, at 105*l.* per annum. The defendant pleaded as to all but 52*l.* 10*s.* non-assumpsit; and as to 52*l.* 10*s.* payment. Issue was joined on non-assumpsit; and a *nolle prosequi* entered as to the plea of payment. The defendant not having used the plaintiff's particulars at the trial in order to restrict him in his proof:—*Held*, that although

the defendant proved payment of all the rent, the plaintiff was entitled to a verdict with nominal damages. *Nicholl v. Williams*, 220.

#### PATENT.

1. G. the inventor of an improvement in the wheels of steam-engines, before he took out a patent, procured C., an engineer, to make two pair of wheels at his factory, with an injunction as to secrecy. The wheels were completed at C.'s factory with the privity of the plaintiff, but not shown to those who might happen to come there; and after remaining a short time were taken to pieces, packed up in cases, and sent abroad for the use of a company, of which the plaintiff was a director. G. afterwards took out a patent, and assigned it to the plaintiff: *Held*, that there had been no use or publication of the invention, and that it was new at the time the patent was taken out. *Morgan v. Seaward*, 55.

2. *Semb'c*, that if an inventor, before he takes out a patent, constructs an article for public sale, though only fit for a foreign market, or to be used abroad, such a sale would be a use of the invention, so as to defeat a patent afterwards taken out. *Id.*

3. In an action for infringing a patent, the declaration stated the plaintiff to be the inventor of "certain improvements in steam engines, and in machinery for propelling vessels;" which improvements were applicable to other purposes; the defendant pleaded that the invention was not an improvement in steam engines. This issue was found for the defendant:—*Held*, on motion for judgment *non obstante veredicto*, that the plea was good after verdict. *Id.*

4. If a patent suggest that certain inventions are improvements, and one of them be not so, the patent is void, unless the objection be remedied under the 5 & 6 Will. 4, c. 83. *Id.*

5. Where the subject of a patent, taken altogether, is useful, the patent is valid, though part or parts of the machine be useless. *Id.*

6. *Semble*. In order to take advantage of the defence of want of utility in the subject of a patent, the defendant should plead the words of the statute of James 1, and not that the invention was of no use. *Id.*

7. The 5 & 6 Will. 4, c. 83, s. 1, is not retrospective in its operation, so as to enable a party entering a disclaimer under that act, for such parts of his invention as are not new, to have a right of action against persons who have infringed the patent before such disclaimer; and this, even where the infringement has been in respect of portions of the patent not included in the disclaimer. *Perry v. Skinner*, 122.

#### PAYMENT.

In an action of debt, payment cannot be given in evidence in reduction of damages. *Bulbin v. Butt*, 70.

#### PAWNBROKER.

Trover, by the assignees of a bankrupt for certain watches. Plea—that defendant was a pawnbroker, and that they were pledged with him. Replication—that it was corruptly agreed that defendant should lend the bankrupt a sum exceeding 10*l.*, and should forbear and give day of payment thereof, to the bankrupt, until the expiration of one year next after such loan, and that the bankrupt should pay more than lawful interest, and for securing repayment the bankrupt should pledge the watches. At the trial it did not appear that there was any agreement as to the time the watches should remain in pledge. The judge amended the record by inserting the words "redeemable in the meantime." *Held*, on motion to enter a nonsuit, that this was a contract within the Pawnbrokers' Act. *Nickisson v. Trotter*, 350.

#### PETITION OF RIGHT.

A petition of right was addressed "to the King in his Court of Exchequer," and prayed that he would order "right to be done," and that he would indorse the petition to that effect: it also prayed, that the king would refer the petition to the "Barons of the Exchequer;" the king indorsed the petition "*soit droit fait*:"—*Held*, that this Court had no power to adjudicate upon the petition. *In re Pering*, 223.

#### PLEADING.

See BAIL-BOND. BANKRUPT, 3. BILLS OF EXCHANGE, 1. EVIDENCE, 5. PATENT, 1. PROMISSORY NOTE, 1.

1. In an action on the case against the sheriff for a false return of *nulla bona* to a writ of *fi fa*, the plea of "not guilty" only puts in issue the fact of the sheriff having the money in his hands, and making the return alleged. *Wright v. Lainson and another. Sheriff of Middlesex*, 202.

2. Assumpsit by indorsee against the maker of a promissory note. Plea, that the note was given for money lent at play, and that it was indorsed to the plaintiff, with notice, and without consideration. Replication, traversing the notice and want of consideration; and issue:—*Held*, that the pleadings did not admit the illegality of the original consideration, so as to call upon the plaintiff, in the first instance, to prove that he had given value; but that the defendant ought to have given evidence of the illegality before he could throw such proof on the plaintiff. *Edmonds v. Groves*, 211.

3. In trespass for assault and false imprisonment, the defendant pleaded that he was possessed of a shop, and carried on the business of a baker there; that the plaintiff had been in the shop, making a great noise and disturbance, and abused, &c., the defendant, in breach of the king's peace: it then went to aver, that the plaintiff went out into the street, and continued there to make a noise, &c., and to abuse the defendant, and caused a large concourse of people to assemble, and so disturbed and obstructed the defendant in his business, in breach of the peace, and thereby caused a riot and disturbance; and that the defendant, in order to preserve the peace, sent for a policeman, who took plaintiff into custody on his refusing to cease his noise, &c.:—*Held*, that, omitting all the allegation as to a riot, the plea was a sufficient justification. It was proved, that the plaintiff, on leaving the defendant's shop, went into the street, and uttered loud abuse against him, and thereby attracted a large concourse of people, so as to obstruct the streets; that, thereupon, the defendant sent for the police, who requested plaintiff to leave the place, and, on his refusal, took him before a magistrate:—*Held*, that these facts amounted, in law, to a breach of the peace. *Cohen v. Huskinson*, 150.

4. In debt, on an award, the declaration stated, that there had been a submission to arbitration by the plaintiff, as administratrix of M. T., deceased, and the defendant, concerning moneys due by the defendant to the plaintiff, as such administratrix; and, in respect of a part of which moneys, there had been a settlement in the lifetime of M. T., which was the last settlement previous to the award made pursuant to the said submission; and that arbitrator awarded a payment of 150*l.*, together with interest from the date of the said last-mentioned settlement, by the defendant to the plaintiff. The plaintiff pleaded, first, that the arbitrator did not make an award concerning the premises in the declaration, *modo et firmá*; secondly, that the day in the declaration mentioned in that behalf, was not the day of the last settlement; thirdly, that no such settlement, as in the declaration mentioned, was at any time made:—*Held*, that the second issue was immaterial, and the jury having found it for the defendant, the Court awarded a repleader.

*Held*, also, that as there appeared to be no dispute between the parties, as to the day of the last settlement, the award was sufficiently certain.

Where there are several pleas on the record, and issues thereupon, and none of the pleas are in confession of the cause of action, the Court, if there be an immaterial issue raised on any plea, will grant a repleader, and not a judgment *non obstante veredicto*.

On a judgment of repleader, neither party is entitled to costs. *Plumber v. Leigh*, 152.

5. *Semble*, since the new rules, that *nunquam*

*institutus* is a bad plea in debt on a penal statute. *Monterau v. Skerborne*, 40.

6. To an action for work as an attorney, defendant pleaded that plaintiff conducted the business so negligently and unskillfully that defendant had no benefit from his services; and also that plaintiff undertook to do the work for nothing:—*Held*, bad, as amounting to the general issue. *Hill v. Allen*, 37.

7. *Non assumpsit* is a good plea to an action by an executor, on bill or note, where the promise is laid to the executor. *Tumms and another v. Platt*, 264.

8. In a count on a bill or note, it is not necessary to allege a promise to pay; at least, the omission cannot be matter of objection, except on special demurrer. *Gillett v. Rarburgh*, 225.

9. Trespass for assaulting and beating the plaintiff. Pleas: first, not guilty; secondly, that defendant was lawfully possessed of a public-house, into which the said plaintiff entered, and made a great noise and disturbance therein, whereupon the defendant requested her to cease from making such noise and disturbance, and to depart out of his house, which she refused to do; whereupon the defendant gently laid his hands upon her, and removed her from the house. Replication, *de injuria*:—*Held*, that there being proof of the fact of a noise and disturbance in the house, in consequence of which, the defendant was legally entitled to remove the plaintiff, the *motus and intention* of the plaintiff in so removing her, could not be inquired into under the replication *de injuria*. *Oakes and Wife v. Wood*, 237.

10. The first count was on a bill of exchange, drawn by the plaintiff and accepted by the defendant in Scotland. The second count was on a similar bill, and after stating the drawing and acceptance, set forth the registering of a protest of non payment, in the Court of Session in Scotland, and the issuing of letters of horning and poinding against the defendant, and then alleged that, by virtue of the premises, the defendant became liable to pay:—*Held*, that this latter count was in effect a count on the bill, and did not disclose a sufficient cause of action as upon judgment in Scotland. *Hay and another v. Fisher*, 286.

11. To a declaration in assumpsit against the defendant as a common carrier, on a contract to carry goods from N. to B. and safely to deliver them, with an averment that he did not deliver them, but that by his negligence they were lost, the defendant in addition to non-assumpsit, pleaded an agreement between him and the plaintiff, that the plaintiff should accompany him to guard the goods from N. to B.:—*Held*, on special demurrer, as amounting to the general issue. *Brind v. Dale*, 217.

12. To trespass for seizing and impounding plaintiff's horse and cart, defendant pleaded that they were encumbering and doing damage to his

close and grass. Plaintiff replied, that the defendant agreed to sell and sold to the plaintiff, and that plaintiff agreed to buy, and then bought of defendant, the grass in the said close, with liberty to enter with his horse and cart to take away the same:—*Held*, that the plaintiff was bound to prove a valid contract binding in law; and as the contract in question was not in writing, it was not available in support of the replication; *held* farther, that this contract might have been pleaded as a license. *Carrington v. Roots*, 14.

13. To trespass for breaking and entering plaintiff's dwelling-house, defendant pleaded that one W. F. was his tenant at a certain rent, and that he had fraudulently removed his goods to the plaintiff's house to avoid a distress, and defendant justified an entry under a warrant to search for the goods: plaintiff new assigned that the trespasses were committed on a different part of the same day: defendant pleaded a similar justification:—*Held*, that the new assignment was not an admission of the facts stated in the plea to the declaration, and therefore defendant could not make use of them in support of his plea to the new assignment. *Norman v. Westcombe*, 18.

14. In an action on the case for negligent driving, the defendant pleaded, that the plaintiff by his servant so negligently drove his carriage, that it struck against the coach of the defendant, without this, that the coach of the defendant struck against the carriage of the plaintiff, through the carelessness of the defendant:—*Held* bad on demurrer, as amounting to the general issue. *Gough v. Bryan*, 218.

15. The declaration stated, that the defendant was indebted to the plaintiffs and one A. their deceased partner, for money found to be due to the plaintiffs and A., on an account stated "between them." *Breach*, that he had not paid any of the said monies or any part thereof:—*Held*, upon special demurrer, a sufficient averment that the account was stated between the plaintiffs and defendant; *held* also, that the breach was sufficient, although the promise was to pay the plaintiffs and A. *Debenham and another v. Chambers*, 323.

16. A declaration in *assumpsit* stated that the defendant, carrying on business at *Liverpool*, sent to plaintiffs, carrying on business at *New Orleans*, an order to purchase cotton for the defendant. *viz.*, if they, the plaintiffs, could purchase cotton at such price as to stand in, laid down in *Liverpool*, all charges included, *Liverpool* fair, 9½*d.* per lb, good fair, 10*d.* per lb.; then the plaintiffs were to purchase cotton to the extent of 200 bales, and if at ½*d.* per lb. under those prices, 300 bales, if at ¼*d.* under those prices, 400 bales, and to draw bills of exchange, on defendant, for the amount of the price. It then averred, that plaintiffs purchased a large quantity, to wit, 200 bales of *Liverpool* fair cotton, at such prices as to stand in 9½*d.* per lb.,

laid down at *Liverpool*, all charges included; that the cotton arrived in *Liverpool*, and there was ready to be delivered to defendant. *Breach*, that the defendant did not accept the cotton so purchased:—*Held*, on demurrer, that the declaration was bad, as it did not sufficiently shew that the plaintiffs were ready and willing to deliver the 200 bales only. *Dixon v. Fletcher*, 342.

17. In debt on an annuity bond, the defendant pleaded, that no memorial of the said bond was made, according to the provisions of the 53*d.* Geo. 3, c. 141; replication, that a memorial was duly enrolled, containing all matters required by the statute; rejoinder, that the said memorial therein set forth, contained divers false statements and representations, especially in this, to wit, that the said memorial represents, that the consideration for the annuity was paid in notes of the Bank of England, whereas in truth and in fact, the said money was not so paid or otherwise howsoever; (the rejoinder then proceeded again to aver, that there was no such memorial as required by the statute, concluding to the country:)—*Held*, on special demurrer, that the rejoinder was no departure from the plea. *Hicks v. Cracknell*, 364.

18. Debt for goods sold, &c. Pleas, except as to 5*l.* 16*s.* 10*d.* *nunquam indebitatus*; as to 1*l.* 14*s.* 8*d.* parcel of the 5*l.* 10*s.* 10*d.* set-off; and as to the residue, that plaintiff ought not further to maintain his action, because the defendant, when the same became due, was, and ever since has been, ready to pay the same, and that, after it became due, he was ready to tender, and offered to tender the same. but the plaintiff dispensed with an actual tender, because the matter was in the hands of his attorney:—*Held*, that this was an informal plea of tender, and not a plea of payment into court. *Turner v. Crouby*, 362.

#### TIME TO PLEAD.

On the 9th of *January*, plaintiff delivered a declaration indorsed to plead in four days, and demanded a plea. On the 13th defendant took out a summons for further time, returnable at three o'clock on the 14th, and at one o'clock on the 14th plaintiff signed judgment:—*Held*, that the judgment was regular. *Blundell v. Hanson*, 13.

#### PLEADING SEVERAL MATTERS,

In an action against the sheriff for a false return of *nulla bona*, the defence being the bankruptcy of the debtor, the Court refused to allow the defendant to plead two pleas, one traversing the seizure of the goods, and the other setting out the dates, &c., of the act of bankruptcy and fiat. *Wright v. Lainson*, 357.

## POWER.

A. B., by his will, empowered his devisee for life, to demise for twenty-one years, "so as upon every such lease there be reserved and be made payable, during the continuance thereof, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases: and that in every such lease there be contained a clause of re-entry for non payment of the rent or rents to be thereby respectively reserved." The tenant for life made a lease under this power, for twenty-one years, to commence on the 11th of October, 1833, at the yearly rent of 90*l*. payable on the 6th day of April and the 11th day of October, in every year, by equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st day of August next before the determination of the said term. There was also a proviso for re-entry, if the rent should be forty-two days in arrear:—*Held*, that the lease was a good execution of the power. *Doe d. Wythe and others v. Rutland*, 245.

## PRACTICE.

See ATTACHMENT. BAIL, 1. COGNOVIT.  
EJECTMENT. TAXATION OF COSTS.

1. Where no notice of trial has been given, the plaintiff having discontinued, the defendant is not entitled to the costs of the drafts or copies of the briefs. *Doe d. Postlethwaite v. Neale*, 241.

2. It is quite regular to sue out two concurrent writs of summons, provided they issue on the same præcipe and on the same day. *Angus v. Coppard and others*, 325.

3. In a notice to admit the handwriting to a promissory note, which was annexed to the notice, the note was described as bearing date the 10th of October instead of the 11th of November. The defendant consented to an order for the admission of the handwriting of the note described in that notice: at the trial no evidence was produced but this order. A verdict having been found for the plaintiff, the Court refused a rule to set aside the verdict. *Field v. Hemming*, 21.

4. Where in a declaration on a bill of exchange against the defendant as indorser, the defendant pleaded that he did not draw the bill:—*Held*, that although such a plea would have been bad on special demurrer, still that the plaintiff was not entitled to treat it as a nullity, and sign judgment as for want of a plea. *Allen v. Walker*, 44.

5. The defendant was outlawed in May, 1836. In February, 1837, he signed judgment as in case of a nonsuit, and in the March following sued out a *habeas corpus*, to charge the plaintiff in execution for the costs of that judgment:—*Held*, that a motion on the 29th of April, to

set aside the *habeas*, was not too late, no step having been taken upon it. *Albidge v. Butler*, 94.

6. An outlaw cannot appear in Court except to reverse his outlawry. *Id.*

7. The Court ordered, that in future, when a rule, calling on executors to account, is made absolute, the executors not appearing, it should form part of the rule, that "if, upon the delivery of an account, there should be any duties payable to the crown, that the executor should pay the costs of the crown, to be taxed in the usual manner. *In re Robinson*, 71.

8. On shewing cause against a rule for a new trial before the sheriff, affidavits are admissible, containing a statement of evidence which does not appear on the sheriff's notes. *Lilley v. Johnson*, 84.

9. No rule to plead several matters is necessary, where all the pleas together amount only to one entire answer to the declaration. *Archer v. Garrard*, 322.

10. A rule to strike out counts, on the ground that they are substantially for the same cause of action, should be drawn up on reading the declaration, or on an affidavit stating the nature of the counts. *Roy v. Bristol*, 39.

11. The rule of Hilary Term, 4 W. 4, viii, applies to pleas in abatement. *Ryland v. Warmaid*, 73.

12. In drawing up a rule, it is not necessary to specify the particular document on which it is obtained, but it may be described as a *paper writing*, provided it be properly verified by affidavit. *Platt v. Hall*, 91.

13. On a motion for costs of the day, for not proceeding to trial, stay of proceedings cannot be had, although two days' notice of the motion be given. *Eager v. Cuthill*, 338.

## PRISONER.

See BAIL.

1. A prisoner who was supersedable on *mesne* process, having obtained a rule *nisi* for his discharge, the plaintiff on the following day charged him in execution:—*Held*, that the rule *nisi* was no stay of proceedings, and that the defendant could not be discharged. *Robinson v. Cresswell*, 88.

2. The warden of the Fleet is not bound to judge of the fact of a prisoner being supersedable. *Id.*

3. A person living in the rules of the King's Bench, &c., is not in custody so as to entitle him to his discharge under the provisions of the 48 Geo. 3, c. 123. *Gilbert v. Pape*, 47.

4. Where a defendant, who was indebted for a sum originally under 20*l*., gave a cognovit for the debt and costs, amounting to 55*l*., and re-

mained in execution for twelve calendar months; *held*, that he was entitled to his discharge under the 48 Geo. 3, c. 123. *Rathbone v. Fowler*, 325.

5. Where the plaintiff declared against a prisoner in *Hilary* Term, and the cause was tried in the following vacation; *held*, that, by Rule H. T. 4 W. 4, s. 85, the plaintiff should have charged the defendant in execution in *Easter* Term. *Foulkes v. Burgess*, 266.

### PRIVILEGE.

A general writ of privilege does not operate as an injunction, or supersede the necessity of pleading the privilege, but is a mere notice that the party is entitled to it. *In re Thompson*, 175.

### PROHIBITION.

1. The *Bath* court of requests has no jurisdiction to award compensation to a voter for attending the court of a revising barrister on a notice of objection. *Roberts v. Humby*, 331.

2. When a want of jurisdiction appears on the face of the proceedings, the Court will grant a prohibition after sentence. *Id.*

3. *Seem*, that though a want of jurisdiction do not appear on the face of the proceedings, a prohibition may be awarded, after sentence and execution, provided the party had no opportunity of applying earlier, and has not acquiesced in the jurisdiction of the inferior court. *Id.*

### PROMISSORY NOTE.

See **BILLS OF EXCHANGE.**

1. The following was held a sufficient notice of dishonour of a promissory note:—"Sir, I am desired by Mr. H. to give you notice, that a promissory note, dated August 10, 1835, made by S. T. for 99*l.* 18*s.*, payable to your order two months after date thereof, became due yesterday, and has been returned unpaid; I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post." *Hedger v. Stevenson*, 176.

2. The declaration alleged, that one S. T. made his promissory note, and promised to pay to the order of the defendant, at Messrs. B., T., & B.'s, 99*l.* 18*s.*, and then delivered the note to the defendant, and promised to pay the same according to the tenor and effect thereof. But the said Messrs. B., T., & B. did not, nor did the said S. T., nor the defendant, or any other person, pay the said note, although the said note was presented at Messrs. B., T., & B.'s on the day when it became due, of which the defendant

had notice. *Held*, on motion in arrest of judgment that the breach was sufficient. *Id.*

### PUBLIC COMPANY, LIABILITY OF DIRECTOR OF.

See **COMPENSATION.**

The defendant, a director of the *West Cork* Mining Company, ordered certain goods of the plaintiffs, and signed his name P., director of the *West Cork* Mining Company, intimating at the time that the goods were for the company. The company were incorporated by an act of parliament, and in the act was a clause enabling the company to sue and be sued in respect of contracts made by any individual director on behalf of the company:—*Held*, that notwithstanding the defendant was liable in his private capacity. *Dewers v. Pike*, 131.

### REPLEADER.

See **PLEADING**, 4.

### RULE TO COMPUTE.

In an action against three joint makers of a promissory note, the plaintiff had been able to serve two only with a copy of a rule, *nisi*, to compute, and had left a copy at the last place of abode of the other:—*Held*, sufficient service. *Carter v. Southall*, 364.

### RULE TO PLEAD.

1. A rule to plead before notice of declaration, is an irregularity; but is waived by taking out a summons for time to plead. *Pope v. Mann*, 242.

2. It is not irregular to enter a rule to plead before service of notice of declaration, provided the notice of declaration be served on the same day. *Aikman v. Conway*, 356.

### RULES OF COURT.

UPON WHICH DECISIONS ARE REPORTED.

M. T. 1 W. 4, s. 10. (Taxation.)

*Wilson v. Parker*, 46.

*Taylor v. Murray*, 349.

H. T. 2 W. 4, s. 5. (Attachment.)

*Casley v. Binns*, 42.

H. T. 2 W. 4, s. 19. (Bail.)

*Miller's Bail*, 47.



H. T. 2 W. 4, s. 83. (Error.)

*Levi v. Price*, 158.

H. T. 4 W. 4, s. 2. (Demurrer.)

*Lindus v. Pound*, 27.

H. T. 4 W. 4, s. 8. (Time for Pleading.)

*Ryland v. Wormald*, 73.

H. T. 4 W. 4, s. 9. (Error.)

*Levi v. Price*, 158.

H. T. 4 W. 4, s. 85. (Prisoner.)

*Foulkes v. Burgess*, 266.

### SCAVENGER.

Under the 57 Geo. 3, c. 29, s. 59 & 60, the scavenger of a district is not entitled to the dust, ashes, &c. until they are, in the contemplation of the owner, rubbish or refuse. *Filbey v. Combe*, 213.

### SHERIFF.

1. Where the sheriff, after notice that the defendant was about to take the benefit of the Insolvent Act, returned *fieri feci*:—*Held*, that he was concluded by his return, although the defendant was afterwards discharged under the act. *Field v. Smith*, 78.

2. A return by the sheriff that defendant is not to be found in his bailiwick, is bad. *Rex v. The Sheriff of Kent*, 13.

3. The sheriff, or judge, under the Writ of Trial Act, has no power to certify, to deprive the plaintiff of costs, under the 43 Eliz. c. 6, s. 2. *Jones v. Bond*, 14.

### SMUGGLING.

1. The defendant, in the year 1832, hired a vessel in *England* for the purpose of smuggling tobacco into *Ireland*. The cargo was taken on board before the 28th of July, 1833, and was unshipped at *Cork* on 19th of July in that year. The information was filed, on the 19th of July, 1836:—*Held*, that, as the unshipping was the offence contemplated in the act, which offence took place in *Ireland*, the defendant could not be proceeded against in *England* under the 6 Geo. 4, c. 108, as a party guilty of assisting or otherwise concerned in the unshipping of goods. *The Attorney-General v. Kenjefck*, 215.

2. The defendant agreed, at *Rye*, to take a vessel for the purpose of meeting, on the high seas, a ship from *Holland*, and receiving on

board, from the latter, a quantity of contraband tobacco, intended to be smuggled into *Ireland*. This he accordingly did, and the cargo was ultimately landed at *Youghall*.—*Held*, that defendant was liable to penalties within the 3 & 4 Will. 4, c. 53, s. 44; and that the transhipment of the goods from the foreign vessel constituted an illegal unshipment within the statute. *Held*, also, that the venue was properly laid in *England*. *The Attorney-General v. Catt*, 300.

### STAMP.

See AGREEMENT, 2. EXECUTOR, 3.

The plaintiff's landlord conveyed the premises to defendant, on which occasion the plaintiff gave him the following memorandum:—"I hereby certify that I remain in the house, No. 3, *Swinton Street*, belonging to W. G., upon sufferance only, and agree to give W. G. possession at any time he may require."—*Held* not to amount to an agreement for a new tenancy, so as to require a stamp. *Barry v. Goodman*, 108.

### STATUTES,

UPON WHICH DECISIONS ARE REPORTED.

43 Eliz. c. 6. s. 2.

*Rawlins v. Pitt*, 360.  
*Jones v. Bond*, 14.

21 Jac. 1, c. 16. (Limitations.)

*Morgan v. Seaward*, 55.  
*Irving v. Veitch*, 313.  
*Norton v. Ellam*, 69.

21 Jac. 1, c. 23, s. 2. (Certiorari.)

*Laverack v. Bean*, 338.  
*Wait v. Coombes*, 328.

29 Car. 2, c. 3, s. 3. (Frauds.)

*Walker v. Richardson*, 251.  
*Johnson v. Dodgson*, 271.

2 Geo. 2, c. 23, s. 10. (Attorney.)

*Jones v. Jones*, 53.

9 Geo. 2, c. 36, s. 1. (Charitable Use.)

*Walker v. Richardson*, 251.

23 Geo. 2, c. 33, s. 19. (Middlesex County Court.)

*Prichard v. M'Gill*, 79.  
*Balls v. Putner*, 46.

- 39 & 40 Geo. 3, c. 99. (Pawnbroker.)  
*Nickisson v. Trotter*, 350.
- 43 Geo. 3, c. 46, s. 3. (Arrest. Costs.)  
*Edwards v. Jones*, 92.
- 43 Geo. 3, c. 46, s. 4. (Action on Judgment.)  
*Hall v. Pierce*, 83.
- 48 Geo. 3, c. 123. (Prisoner)  
*Gilbert v. Pope*, 47.  
*Rathbone v. Fowler*, 325.
- 49 Geo. 3, c. 142. (Vauxhall Bridge Act.)  
*Young v. Grove*, 228.
- 52 Geo. 3, c. 102. (Inclosure.)  
*Goodtitle v. Milburn*, 207.
- 53 Geo. 3, c. 141. (Annuity.)  
*Hickes v. Cracknell*, 364.
- 55 Geo. 3, c. 137, s. 6. (Poor.)  
*Henderson v. Sherborne*, 40.
- 55 Geo. 3, c. 184. (Legacy Duty.)  
*Attorney-General v. Handcock*, 159.
- 57 Geo. 3, c. 29, s. 59 & 60. (Scavenger.)  
*Filby v. Combe*, 213.
- 6 Geo. 4, c. 16, s. 50. (Bankrupt. Payment.)  
*Cannan v. Wood*, 76.
- 6 Geo. 4, c. 16, s. 50. (Bankrupt. Mutual Credit.)  
*Hulme v. Mugglestone*, 344.
- 6 Geo. 4, c. 16, s. 59. (Bankrupt.)  
*Augarde v. Thompson*, 105.
- 6 Geo. 4, c. 96. (Error.)  
*Levi v. Price*, 158.
- 6 Geo. 4, c. 108. (Smuggling.)  
*Attorney-General v. Kenifick*, 215.
- 6 Geo. 4, c. 134. (Tothill Fields' Act.)  
*Young v. Grove*, 228.
- 7 Geo. 4, c. 57, s. 32. (Insolvent.)  
*Bolton v. Sherman*, 141.

- 9 Geo. 4, c. 98. (Aire and Calder Navigation.)  
*Lee v. Milner*, 275.
- 1 & 2 Will. 4, c. 58. (Interpleader.)  
*Farr v. Ward*, 244.  
*Beale v. Overton*, 172.  
*Holton v. Guntrip*, 324.
- 2 Will. 4, c. 39. (Uniformity of Process.)  
*Lewis v. Ker*, 4.
- 3 & 4 Will. 4, c. 27, s. 23. (Real Property Limitation.)  
*Nepean v. Knight*, 291.
- 3 & 4 Will. 4, c. 42, s. 26 & 27. (Witness.)  
*Yeumans v. Leigh*, 87.
- 3 & 4 Will. 4, c. 53, s. 44. (Smuggling.)  
*Attorney-General v. Catt*, 300.
- 5 & 6 Will. 4, c. 76, s. 54. (Bribery.)  
*Harding v. Stokes*, 6.
- 5 & 6 Will. 4, c. 20. (Game.)  
*Griffith v. Harries*, 8.
- 5 & 6 Will. 4, c. 50. (Highways.)  
*Charington v. Meatheringham*, 30.
- 5 & 6 Will. 4, c. 83, s. 1. (Patent.)  
*Morgan v. Seaward*, 55.  
*Perry v. Skinner*, 122.
- 6 Will. 4, c. 76, s. 92. (Municipal Corporations.)  
*Wood v. Read*, 256.
- 6 & 7 Will. 4, c. 137. (Westminster Court of Requests.)  
*Warne v. Beresford*, 266.

## STOPPAGE IN TRANSITU.

Goods were consigned to A., under a contract for delivery in the port of *London*, at so much per ton. On the arrival of the vessel on board which the goods were, at the wharf, where the captain usually traded, the captain called at A.'s counting-house, and in the absence of A. from home, requested B., his clerk, to give directions for the disposal of the goods. Shortly after, the clerk wrote to the captain, A. being still absent, suggesting that the goods had better be landed at the wharf on A.'s account. They were accordingly landed, and the wharfinger entered them in his book without the name of

any consignee, but with the words "freight and charges" set opposite to them. While the goods were lying at the wharf, A. became insolvent, and the consignor stopped the goods:—*Held*, that the transitus was not determined:—*Held*, also, that the consignor having received A.'s acceptance for part of the goods, was not bound to tender back such acceptance on the insolvency of the consignee before he stopped the goods in transitu. *Edwards v. Brewer*, 132.

#### SURRENDER.

A lease had been granted to A. for twenty-one years by B.; but before the expiration of A.'s term, B. granted another lease of the same premises to C. There was no proof of a surrender in writing by A. of his term, but his lease was found in B.'s custody in a cancelled state; and it was proved that it was the custom to deposit the old leases with B. before a re-grant or renewal:—*Held*, that it was properly left to the jury, under these circumstances, to consider whether there was not sufficient evidence of a surrender of A.'s lease, by act and operation of law, within the 29 Car. 2, c. 3, s. 3. *Walker and another v. Richardson*, 251.

#### TAXATION OF COSTS.

See ATTORNEY, 5.

1. A notice of taxation of costs is unnecessary where an appearance has been entered for the defendant by the plaintiff. *Pope v. Mann*, 242.

2. Where a copy of the bill of costs and the affidavit of increase has not been delivered with the notice of taxation, as required by the rule of Mich. 1 Will. 4, No. 10, it is irregular, unless the party waive it by attendance or otherwise. *Wilson v. Parker*, 46.

3. Where an action for a demand beyond 20*l.* was referred to arbitration, and the arbitrator awarded a sum under 20*l.* to the plaintiff:—*Held*, that the plaintiff's costs ought to have been taxed according to the reduced scale set out in the directions to taxing officers, where the demand is under 20*l.* *Held*, also, that the parties may give the arbitrator the power of a judge, as regards a certificate, by an agreement to that effect in the submission. *Wallen v. Smith*, 326.

4. A judgment on demurrer is not within the rule of *Exchequer*, M. T. 1 W. 4, s. 10, which requires the delivery of a copy of the bill of costs before taxation.

An omission to comply with the above rule is no ground for setting aside the judgment and execution, but only for reviewing the taxation. *Taylor v. Murray*, 349.

#### TENDER.

See BILLS OF EXCHANGE, 1.

#### TRESPASS.

See PLEADING.

If A. wrongfully place his goods on the premises of B. the latter may justify the entry of A.'s close next adjoining, to place the goods there for his use. *Ray v. Sheward*, 68.

#### TROVER.

1. C. a merchant at *Waterford*, who had been in the habit of consigning cargoes of grain to B., a cornfactor at *Bristol*, wrote to latter stating that he was about to ship him a cargo of oats, and that he had drawn on him for 550*l.*, and desiring him to effect an insurance on the cargo. B. accepted the bill. Before the vessel sailed, C. stopped payment, and he then sent the bill of lading, indorsed in blank to H., not informing him of his engagement with B. On the arrival of the vessel, H. sent the bill of lading to B., desiring him to act for him. B. paid the freight, and took possession of the cargo, which was afterwards seized by the defendants, creditors of C., under a foreign attachment. *Held*, that B. had not such a property in the goods as to enable him to maintain trover against the defendants. *Bruce v. Watt*, 339.

2. Trover by the assignee of an insolvent to recover ten horses and ten sets of harness. Pleas, first, not guilty; second, that plaintiff was not lawfully possessed as assignee; third, that before the insolvent petitioned for his discharge, defendant had sold him five horses and five sets of harness, (being those in the declaration) for 150*l.*, under an agreement that he might at any time, until the price was fully paid, take and retain the same as a security; that at the time of the supposed conversion, 22*l.* 16*s.* was unpaid; and that after plaintiff was possessed, &c., the defendant took the horses and harness as a pledge under the agreement, which was the said supposed conversion. The plaintiff new assigned to this plea, that the action was brought for the conversion of "other and different" horses and harness to those in the plea. To this defendant pleaded not guilty:—*Held*, that the plaintiff was entitled, under this new assignment, to shew that three of five horses seized by the defendant were not within the agreement stated in the plea.

The insolvent horsed a coach one stage for the defendant, and the latter had delivered to him five horses for the use of the coach. Three

of the horses died, and the insolvent bought three others in their stead. On the day the insolvent went to prison, he sent an order directing the delivery of the five to the defendant, who accordingly took possession of them, and refused to deliver them to the plaintiff as assignee of the insolvent. The five were worth 100*l.*, and any two were worth 30*l.* The assignee brought trover to recover the three horses which had been purchased by the insolvent; the defendant pleaded an agreement under which he was entitled to take and retain the five horses sold by him to the insolvent, at any time, until the price was fully paid, and alleged that 22*l.* 10*s.* was still due:—*Held*, that there was no evidence that the insolvent had transferred the property in the three horses which he himself had bought, to the defendant.

*Held*, also, that if he had so transferred them, there was sufficient *prima facie* evidence of voluntariness in the transfer within the 7 Geo. 4, c. 57, s. 32. *Bolton v. Sherman*, 141.

#### VARIANCE.

1. Where the date of the writ of summons was incorrectly stated in the writ of trial, the Court set aside the verdict and subsequent proceedings. *White v. Perrers*, 39.

2. An affidavit to hold to bail described the cause of action as a bill accepted by the defendant, delivered by him to F., and indorsed by F. to the plaintiff. The declaration stated the bill to have been accepted by the defendant, delivered by him to F., indorsed by F. to E., and by E. indorsed to the plaintiff:—*Held* no variance. *Luce v. Irwin*, 303.

#### VAUXHALL BRIDGE ACT.

The Vauxhall Bridge Act, 49 Geo. 3, c. 142, does not exempt occupiers of premises in the Vauxhall Road, but within the limits of the Tothill Fields' Act, 6 Geo. 4, c. 134, from contributing to the paving-rate assessed under the latter act. *Young v. Grove*, 228.

#### VENUE.

Where on an application to change the venue from Lincolnshire to Yorkshire, it was retained at Lincolnshire on the plaintiff's undertaking to give material evidence there:—*Held*, that on his failing so to do, the objection ought to have been taken at the trial; as (in case it had been then taken) the plaintiff might have answered the objection by giving evidence at Lincolnshire. *How v. Pickard*, 125.

#### WARRANTY.

A., the father of the plaintiff, purchased a gun at the shop of the defendant, and stated, at the time, that he purchased it for the use of himself and his sons. The defendant warranted and represented that the gun was made by N., and was a good, safe, and secure gun. The plaintiff used the gun, which exploded, and shattered his arm. In case for this injury, the declaration averred the warranty by the defendant, and denied that the gun was made by N., or that it was a good, safe, and secure gun; of all which the defendant had notice, &c. It was also averred that he, the plaintiff, used the gun, knowing and confiding in the warranty by the defendant. The defendant pleaded not guilty, and also denied that he had made the representation, &c., or that the gun was unsafe, &c. The jury having found a verdict for the plaintiff on all the issues, *held*, on motion to enter a nonsuit for want of privity between plaintiff and defendant, that the action was maintainable. *Langridge v. Levi*, 134.

#### WILL.

S. being seised in fee of certain freehold property, and being absolutely entitled to certain leasehold property, devised the freehold to his wife C. S., in fee, and the leasehold to her during the lives of J. and D. S., and if they should survive her, to her heirs. C. S., by her will, devised all her property to T. T. and E. D., in trust to pay an annuity to M. D. She also gave a legacy to W. J., and certain yearly sums to her grandnieces during their apprenticeship. She appointed her trustees executors, and directed that, after payment of her debts, the residue of her property should be equally divided between her said two grandnieces. C. S. died in 1792, when the two grandnieces commenced receiving the rents and profits, subject to the annuity. In 1814, E. J. married, and died in 1815. Upon her death the defendant entered into possession, and received the rents of her moiety. The annuity to M. D. ceased in 1804, and the legacy to W. J. was paid in 1812:—*Held*, that under the will of C. S., the legal estate in the freehold property vested in the trustees, and that the Court could not presume a reconveyance:—*Held*, also, that as the lessor of the plaintiff had not shewn that the lease to J. S. was not a lease for lives to him and his heirs, he had not made out a title to the leasehold estates. *Doe d. Rees v. Williams and Wife*, 198.

## DIGEST.

### WITNESS.

See ATTORNEY, 3.

In an action for negligent driving, the defendant's servant is a competent witness for him, under 3 & 4 W. 4, c. 42, ss. 26, 27. *Yeomans v. Leigh*, 87.

### WRIT OF SUMMONS.

1. It is not necessary to indorse the amount of the debt and costs on a writ sued out to recover penalties under the Municipal Corporation Act. *Davies v. Lloyd*, 361.

2. Where a copy of a writ of summons commenced "William the Fourth," instead of "Victoria," the Court set it aside for irregularity. *Drury v. Davenport*, 353.

### WRIT OF TRIAL.

See VARIANCE.

Where an action of tort was tried, by consent before the under-sheriff, and a verdict found for the plaintiff on one issue, and for the defendant on another; *held*, that no judgment could be given, as the trial was altogether a nullity. *Smith v. Brown*, 267.

END OF VOLUME.











1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is crucial for ensuring transparency and accountability in the organization's operations.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It highlights the need for consistent and reliable data collection processes to support effective decision-making.

3. The third part of the document focuses on the role of technology in enhancing data management and analysis. It discusses how modern software solutions can streamline data collection, storage, and reporting, thereby improving efficiency and accuracy.

4. The fourth part of the document addresses the challenges associated with data management, such as data quality, security, and privacy. It provides strategies to mitigate these risks and ensure that data is used responsibly and ethically.

5. The fifth part of the document concludes by summarizing the key findings and recommendations. It stresses the importance of ongoing monitoring and evaluation to ensure that the data management processes remain effective and up-to-date.

